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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1028

SCM CORPORATION,

Petitioner-Defendant,

—against—

ADVANCE BUSINESS SYSTEMS & SUPPLY COMPANY,

Respondent-Plaintiff.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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January 2, 1970

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ADVANCE BUSINESS SYSTEMS & SUPPLY COMPANY,

Respondent-Plaintiff.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on August 18, 1969.

Opinions Below

The main and supplementary opinions of the United States District Court for the District of Maryland (Roszel C. Thomsen, *C.J.*) granting a judgment for the plaintiff were reported at 287 F. Supp. 143 and are printed as Appendix A and B to this petition.

The opinion of the United States Court of Appeals for the Fourth Circuit (Sobeloff, Bryan, and Butzner, *JJ.*)

affirming and remanding for modification of the award of damages was reported at 415 F.2d 55 and is printed at Appendix C to this petition.

Jurisdiction

The judgment of the court of appeals was entered on August 18, 1969, and the petition for rehearing was denied on October 6, 1969. The order denying the petition for rehearing is printed as Appendix D hereto. This petition is being filed within the 90 days after the denial of the petition for rehearing. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1). Jurisdiction was conferred upon the District Court by 28 U.S.C. § 1337.

Questions Presented

1. Whether a seller who offers for sale separately various products each at reasonable prices violates the antitrust laws' prohibition against tie-ins when it simultaneously offers the products in a combination package?

2. Whether a seller of an alleged tying product which has not been found to be in any way unique and as to which there has been no finding of any economic power can be found to have imposed an illegal tie-in under Section 1 of the Sherman Act as recently applied in this Court's decision in *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969) or under Section 3 of the Clayton Act?

Statutes Involved

The statutes involved are Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 3 and 4 of the Clayton Act, 15 U.S.C. §§ 14 and 15. These statutes are set forth in Appendix E of the petition.

Statement of the Case

The petitioner-defendant, SCM Corporation ("SCM"), manufactures and distributes electrostatic office copying machines. SCM also sells copy paper, supplies, and service for these machines.

The respondent-plaintiff, Advance Business Systems and Supply Co. ("Advance"), is a franchised dealer in Baltimore of Nashua Corporation ("Nashua"), a large manufacturer of paper and supplies usable in copying machines, including the SCM machines.

When SCM entered the business in 1962, Xerox Corporation ("Xerox") was already established as the dominant competitive factor in the office copying market. In 1967 Xerox controlled approximately 60% of the office copying market in the United States; by contrast, SCM accounted for only 3% of the market. By 1967, there were 26 manufacturers of electrostatic copying machines, as well as numerous manufacturers and sellers using other copying processes; as the appellate court recognized, "the office copying machine market is actively competitive, with customers changing readily from one copier to another." (App. C, p. 44a)

SCM sold its copying machines, its paper, its supplies, and its service at separate and reasonable prices free from any condition concerning the customers' use of competitive products. The court of appeals recognized this to be a fact but nevertheless ruled that three contracts (copy service, rental, and service maintenance) used by SCM in marketing those copying products constituted unlawful tie-ins. In making the ruling, the court disregarded the evidence concerning the nature of competition in the market and the absence of evidence of economic power in any of SCM's products.

SCM Copy Service Program. SCM distributed a number of models of copying machines. One of them, first distributed in 1966 in competition with the Xerox 914 copier, was the Model 55 console book copier, which was made available to the public on a sale, lease, and copy service basis.

The Model 55 was offered for sale at reasonable prices* and free of any conditions requiring purchase of SCM paper and supplies which were also separately available at reasonable prices. Additionally, the Model 55 was made available by SCM for lease through independent leasing companies. In the lease transaction, SCM sold the machine to one of a number of leasing companies and delivered the machine to the customer, who in turn entered a lease arrangement with the leasing company. The entire trans-

* The Model 55 was initially offered for sale at $4,250; later units were sold for $3,250. This price compared favorably with the prices of companies selling competing copying machines, such as Xerox ($29,500), Bruning ($5,500 and $6,000) and Dennison ($2,395).

action was processed by the SCM salesman. There was no evidence offered at trial that either the lease arrangement or the sale was unrealistically priced, and neither court below found either mode of distribution to be illegal.

Additionally, SCM offered the Model 55 to the public on a copy service basis.* Under the copy service program, the customer received essentially a single product—copies—and paid only for those copies made by the machine, as measured by a meter. This method of marketing was a specific response to the widely accepted meter pricing system used by Xerox. The SCM meter charge included the cost of the machine, service, paper and supplies, all of which were supplied by SCM. The copy service agreement could be cancelled by the customer at any time on thirty days' notice.

The court found that the SCM copy service program constituted an illegal tie-in under Section 3 of the Clayton Act because the components were included in a package price. Although SCM also offered for sale each of the components separately at prices nowhere challenged by plaintiff and nowhere found to be unreasonable or noncompetitive, the court refused to accept this separate availability as a bar to finding an illegal tie-in.

Rental. SCM distributed its desk top model machines by sale and rental.** Approximately 96% of these machines were sold outright, and only 4% were distributed on a rental basis. The court held that, as interpreted and applied by SCM salesmen in Baltimore, the clause in the

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* The copy service agreement is reproduced at Appendix F.

** The rental agreement is reproduced at Appendix G.

rental agreement proscribing the use of "supplies which may cause damage or deterioration" created an illegal tie-in under Section 3 of the Clayton Act.

Virtually all of its customers chose to purchase rather than rent. The district court's findings of fact expressly state:

> "SCM endeavors to sell its copying machines instead of renting them. The rental plan contains a conversion option and is intended to give a hesitant customer an opportunity to test the machine."

This is the first time that a federal court has found illegal the tying of the sale of one product with another where it has also found that the defendant actively tried, and almost entirely succeeded, in selling the alleged tying product separately.

Service Maintenance Agreement. SCM provided service for its machines on two bases. The most popular was the time-material basis, which was the way over 75% of its Maryland customers obtained service from SCM. The service was provided at a reasonable charge and free of any condition concerning the use of competitive supplies.

Additionally, SCM provided service under a service maintenance agreement, pursuant to which it undertook to render an unlimited number of repairs for a fixed annual fee of $85.00.* The district court found that SCM servicemen in Baltimore had on occasion threatened to terminate the service maintenance contract where competitive supplies were used and to revert to providing service on the

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* The service maintenance agreement is reproduced at Appendix H.

time-material basis. On these facts the district court properly ruled:

> "The antitrust laws do not require SCM to furnish service at a flat rate under its service agreement when other than SCM supplies are used, provided SCM is willing to furnish service in such cases at a fair rate on a time and material basis." (App. A, pp. 22a-23a)

The court of appeals, however, rejected the district court's holding and ruled that the service maintenance agreement was illegal under Section 1 of the Sherman Act, notwithstanding the separate availability of service on a time-material basis.

SCM does not seek review of the charges against certain SCM Baltimore employees of "misrepresentations" or "threats of cancellation" as found by the court below. Such acts were only relevant to the lower court's conclusion that the service maintenance agreement and the rental agreement for the desk top copiers were, in effect, conditioned on purchase of SCM supplies; and although SCM believes that factual conclusion to have been erroneous, it is not challenged here and, for the purposes of analyzing the legality of those agreements and considering the important questions of antitrust law presented, that factual conclusion has been accepted.

Reasons for Granting the Petition

The court of appeals has decided a federal question in direct conflict with the applicable decisions of this Court including *Northern Pacific Ry.* v. *United States*, 356 U.S. 1 (1958), and *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969). The court below, by ruling

that SCM's service maintenance, rental, and copy service agreements were illegal has for the first time in any decision in any federal court abandoned the traditional definition of a "tie-in" arrangement and fashioned a new rule which undercuts, rather than promotes, competition.

The lower court has furthermore decided an important question of federal law—the application of the antitrust prohibition against tie-ins to package offers by a seller having no economic power over any of the components, each of which is separately available on reasonable terms—which has not been, but should be, settled by this Court. A new concept of "economic equivalen[ce]" (App. C, pp. 48a, 54a)* was constructed by the court of appeals to overcome the established rule that separate availability of the components precludes a finding of illegality.

The lower court's refusal to require a showing of "economic power" in the tying product to establish an illegal tie-in, either under Section 1 of the Sherman Act or Section 3 of the Clayton Act, presents a further important federal question which should be decided by this court. In concluding that SCM's service maintenance agreement violated Section 1 of the Sherman Act, the Fourth Circuit read the opinion in *Fortner Enterprises, Inc.* v. *United States Steel Corp., supra,* to permit a presumption of "sufficient economic power" from the mere purchase of the combination.

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* The court of appeals fashioned the new "economic equivalen[ce]" criteria and then found the record "devoid of evidence" (App. C, p. 49a) to satisfy it with regard to some aspects of "economic equivalen[ce]." Even were the "economic equivalen[ce]" theory viable, justice would require a remand to take evidence on this new point which was not tried in the lower court. SCM's petition to the court of appeals for rehearing requested a remand to present evidence on this point and reconsideration of other ascribed errors.

In concluding that SCM's copy service agreement and rental agreement violated Section 3 of the Clayton Act, the court read the dictum in *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594 (1953) to obviate the necessity for any proof of market power under that provision.

This case affords the Court the opportunity, on a fully developed record after trial, to deal with the legality and competitive desirability of single price packages of related products and services. This case presents a further opportunity to resolve the questions left open in the decision of *Fortner Enterprises* concerning the extent of market power necessary to find an illegal tie-in arrangement in violation of Section 1 of the Sherman Act and to define for the first time the extent of market power over the tying product necessary for a finding of illegality under Section 3 of the Clayton Act.

A. The Circuit Court's Failure to Treat the Separate Availability of SCM's Products and Service as Precluding the Finding of an Illegal Tie-In is in Conflict With the Applicable Decisions of This Court.

Heretofore a tie-in has always been defined as the refusal to sell one ("dominant" or "tying") product unless a second "tied" product is purchased also. This definition was precisely articulated in *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5-6 (1958):

> "[A] tying arrangement may be defined as an agreement by a party to sell one product but *only on the condition* that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." (Emphasis added)

By this definition, there cannot be compulsory joining of independent products under circumstances where each of the components allegedly tied is also available for sale at separate and reasonable prices.

Thus, the first step in this Court's decision in *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 498 (1969), was a finding that the case involved "a tying arrangement of the traditional kind." This Court found that the credit corporation "sold its credit *only on the condition* that petitioner purchase a certain number of prefabricated houses . . . .". (Emphasis added)

This Court in *Northern Pacific Ry.* v. *United States*, *supra* at 6, n. 4 (the footnote to the definition of a tying arrangement quoted above), made clear that the separate availability of products precludes an illegal tie-in:

> "Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price."

The same principle was applied with respect to block-booking of motion pictures. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948). While the block selling in the *Paramount* case was found to constitute an illegal tie-in, the Court declared that block-booking was not unlawful where films were made available for booking on an individual basis as well:

> "We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted." (*Id.* at 159)

The unrestricted freedom of a customer to choose between a package offer and its separate components or between a flat-rate service contract or service on a per-call basis is the antithesis of a tie. Such freedom of choice is exactly what SCM's customers had here.

The circuit court misapplied prior decisions of this Court by failing to recognize with respect to the Model 55 copy service agreement, the SCM rental agreement and the service maintenance agreement that in each instance a conclusion of illegal tie-in is precluded by the separate availability of each of the components.

(1) *SCM Copy Service Program.* Any customer who preferred not to take SCM's Model 55 in a package with paper, supplies and service was free to purchase the machine outright and use it with any supplies and service of his own choosing. Not only was he free to do so, but the evidence and findings of fact in the district court show that SCM's customers in fact did so. In the nine months between the introduction of the Model 55 and the trial of this case, SCM had sold over a half million dollars worth of these machines.

Given these facts, which both courts below acknowledged, a conclusion of legality was required by *Northern Pacific Ry.* v. *United States, supra.* But the court of appeals injected a new tie-in concept, never before used in any court. The court of appeals wrote that "purchase . . . for $4,250" is clearly not "the economic equivalent of rental . . ." (App. C, p. 48a), a factual conclusion which has no basis in the evidence or the district court's findings.

The economic equivalence criterion departs from prior decisions of this Court and places in serious doubt the

legality of all package marketing promotions. It is not enough under the decision below that each component be separately available on reasonable and competitive terms; each component must be the "economic equivalent" of the package, a requirement which could bar any promotional or bargain package offer.

In the instant case, the SCM copying machine was undeniably priced and sold on a basis competitive with comparable copying machines. Purchase may be more desirable for some customers, a lease may fit the needs of others, and a copy service plan may be acceptable to still others. One marketing plan cannot be equivalent to all other plans. Indeed, the very purpose of offering alternatives was to attract the widest possible customer acceptance and endeavor to meet the overwhelming competition from Xerox and others. The objectives of the antitrust laws are not only satisfied by the availability of different alternatives, but competition is obviously enhanced. Logic, law, and economic theory demand the encouragement of promotional package and discount offers, not their demise by judicial fiat.

(2) *Rental.* Similarly, any customer who wished to use competitive supplies with SCM's desk top models was free to purchase any of the machines separately at a reasonable price. The most eloquent evidence of the reasonableness of the price was the fact that 96% of the customers elected to take the machines on that basis, and only 4% chose the rental option. The district court recognized that SCM actively and diligently attempted to sell these machines outright and free of any restrictions.

The question that apparently most concerned the Fourth Circuit was whether a rental agreement, which objectively and legally prohibited the use of materials in the machine which would cause "damage or deterioration," could become illegal if an SCM salesman told a customer that Nashua supplies might harm the machine. Having decided that question against SCM, the Fourth Circuit ignored the question of how SCM could ever have coerced anyone (even assuming that it tried) by this "rental" tactic in view of the fact that anyone who wanted to use Nashua paper could buy the machine. This freedom was not just theoretically there; 96% of the public took the purchase option.

In a sense, of course, rental is not the "economic equivalent" of purchase for all customers; they are not interchangeable. But in either case, machine cost, whether as rentals or amortized purchase price, is an element of the cost of the ultimate product, copies. Some customers chose purchase and others rental. The critical fact under the prior decisions of this Court is that both alternatives were offered. The fact of this difference is pro-competitive; the new concept of economic equivalence tends toward reducing differences and is hence anti-competitive.

(3) *Service Maintenance Agreement.* SCM retained the right to suspend its flat rate service agreement and revert to service on a time-material basis if SCM concluded that competitive supplies used with the service agreement caused an undue amount of service difficulty. This entirely reasonable limitation could not have created an illegal tie-in where any customer who wished to have SCM service and use competitive supplies was free to do so. The district court's findings of fact state:

> "No evidence has been offered to show that any customer using Nashua supplies was ever refused service when it was requested."

SCM offered service at reasonable rates on a time-material basis separate from any of its other products. The most obvious proof of the fact that the offer was reasonable was that 75% of its customers in the Baltimore area did in fact take service from SCM on that basis.

On this issue, the court of appeals did not even use its newly articulated "economic equivalence" criterion developed for judging the copy service and rental agreement under Section 3 of the Clayton Act. It simply assumed the existence of what *Fortner Enterprises* refers to as "the traditional tie-in arrangement" (where the tying product may only be purchased on the condition of purchase of the tied product); and, of course, only on the basis of that unwarranted assumption could its *per se* approach have been used at all. Thus, in effect, the court of appeals was applying a lesser standard—indeed, no standard—under Section 1 of the Sherman Act than it had applied to copy service and the rental under Section 3 of the Clayton Act.

* * * * *

The undisputed separate availability of each of the components on reasonable terms would under all prior rulings of this Court have required a finding by the court of appeals that SCM's copy service, service maintenance and rental agreements complied with the law. The imposition of a new requirement under Section 3 of the Clayton Act—"economic equivalence"—is not founded on this Court's prior decisions, is not conducive of competition and

presents an important federal question as to the legality of package offers generally.

B. The Circuit Court Failed to Apply the Prior Decisions of This Court Requiring a Showing of Sufficient Economic Power and Misconstrued This Court's Decision in *Fortner Enterprises*.

Even if the products allegedly tied were not separately available, illegality is not, according to the prior decisions of this Court, established in the absence of a demonstration of uniqueness or sufficient economic power over the tying product. A seller with no power over the tying product is in no position to coerce, or even induce, the combined purchase of the tied product, for, as this Court explained in *Northern Pacific, supra* at 7:

> "... if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

Yet the court of appeals here, for the first time by any court, concluded that it need not find uniqueness, economic power or any power over the tying product but that it was now free to assume "economic power" from the mere "imposition of a tie-in arrangement on a substantial amount of commerce." (App. C, p. 50a) In finding the rental agreement and the copy service agreement violative of Section 3 of the Clayton Act, the court of appeals concluded that no market power over the tying product need be shown at all.

Thus, substantial questions are presented here as to the extent of economic power over the tying product necessary

for a finding of illegality both under Section 3 of the Clayton Act, on which the Court has heretofore spoken only by way of dictum, and Section 1 of the Sherman Act, recently considered in *Fortner Enterprises*. In considering the Section 1 charge, the court below erroneously concluded that it could dispense with any finding of economic power over the tying product. This error was occasioned by its misreading of this Court's decision in *Fortner Enterprises*, which led the court to conclude that it could now presume from the mere fact that a seller persuaded some customers to purchase a combination of products that the seller had "sufficient economic power" in the tying product. Thus the Fourth Circuit reasoned:

> "a seller's successful imposition of a tying arrangement on a substantial amount of commerce may be taken as proof of his economic power over the tying product." (App. C, p. 50a)

The Fourth Circuit's view is inconsistent with the *Fortner Enterprises* decision, which clearly holds that a finding of "sufficient economic power" with respect to the alleged tying product is necessary (394 U.S. at 499). The court's decision is also not realistic in light of the facts in this case. Clearly, SCM does not have "sufficient economic power" in the tying products, *i.e.*, copying machines. SCM has only a 3% penetration of the office copying market, as compared with Xerox's 60%. SCM's share of this market under its Model 55 copy service program is 0.6%. Moreover, the same type of machine manufactured by SCM is sold by over two dozen other actively competing firms. Under these circumstances, any attempt by SCM to coerce an unwilling customer using its machine to buy the paper and supplies from SCM could not have succeeded.

The hard economic fact is that any such attempted coercion would only have forced the customer to take his patronage to some other competing supplier. The court of appeals also ignored *Northern Pacific Ry.* v. *United States, supra* at 6:

> "Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most."

But beyond the fact of ready availability of competitive alternatives is the even more significant fact of availability of SCM alternatives. An index of SCM's lack of market power is the fact that only 4% of its customers rented machines (the mode of distribution found to be tainted with the implicitly "coercive" conditions), while 96% purchased the machine outright. Similarly, only 25% elected to take the flat-rate service maintenance agreement (which supposedly contained illegal conditions), while 75% of SCM's customers preferred to call for service on a time-material basis.

If one can believe that SCM used these contracts as tying devices, one must believe that SCM utilized the weakest economic devices available for its illegal scheme and that the overwhelming majority of its customers easily escaped the net. This, of course, is the reason that the availability of alternatives is the crucial point in this case: whatever economic lever SCM had because of its "economic power" in the "dominant" product, SCM gave it away when it offered to sell the dominant product separately at reasonable prices and free of condition.

For a tie-in to exist, the seller must *not* be willing to sell the dominant product independent of the tied product, since otherwise no compulsory joining of the products can exist. For example, in *Times-Picayune,* if the newspaper had offered separate and reasonable rates for advertising in both morning and evening newspapers as well as the challenged combination rates, no tie-in problem would have been presented in the first place. In *United States* v. *Loew's Inc.,* 371 U.S. 38 (1962), and *Paramount,* the industry's practice of block-booking motion pictures ceased to be of antitrust interest when it was established (by court decree) that the products would be offered individually as well as in combination. In *Fortner Enterprises,* the steel company's offer of financing in connection with the sale of prefabricated houses would have had no antitrust implication whatever if at the same time the company had offered financing to customers independent of any requirement to purchase its products.

It was the absence of separate availability that placed each of the foregoing combination offers in antitrust jeopardy. In this respect, the decision of the Fourth Circuit is plainly inconsistent with all decisions of this Court on the subject.

Moreover, the absence of uniqueness of, or economic power by the seller over, the elements of the common package offer is a further reason why such package offers do not violate the antitrust laws. The availability of such products in combination or separately is pro-competitive, not anti-competitive. Yet, if "economic power" is to be assumed, as ruled the lower court here, from the mere

acceptance by some consumers of the package offer, a substantive, and we submit anti-competitive, change in law has been effected, one on which the Court should speak.

Although the monetary award granted in this case is relatively small and injunctive relief is limited in geographical effect, the decision has an enormous and far-reaching impact upon SCM and numerous other firms which commonly use combination or package sales in their marketing programs.

The decision of the Fourth Circuit in this case alters the established concepts of what constitutes an illegal tie-in arrangement. It puts into doubt whether any type of combination or package selling can be safely utilized. The ruling below is plainly inconsistent with all decisions of this Court on the subject, and it is inconsistent with the very definition of illegal tie-ins repeatedly set forth in the decisions of this Court.

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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January 2, 1970



APPENDIX A

APPENDIX A

Opinion of the District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

CIVIL No. 18259

ADVANCE BUSINESS SYSTEMS & SUPPLY COMPANY,
a body corporate of the State of Maryland,

v.

SCM CORPORATION, a body corporate
of the State of New York.

Filed:

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William E. Willis, J. Marshall Wellborn, and Sullivan & Cromwell, of New York, New York, and Arthur W. Machen, Jr., Alan Yarbro, and Venable, Baetjer & Howard, of Baltimore, Maryland, for defendant.

Thomsen, Chief Judge

This is a private antitrust action tried before the Court without a jury, in which plaintiff seeks to recover treble damages and other relief for alleged violations by defendant of sections 1 and 2 of the Sherman Act (15 U.S.C.A. 1, 2) and section 3 of the Clayton Act (15 U.S.C.A. 14).

Defendant (SCM) manufactures and sells many products, including office copying machines which use the electrostatic process described below, and sells paper and other supplies for use in those machines.

Plaintiff is engaged in the distribution and sale in Maryland of paper and other supplies for use in SCM and other office copying machines; it is a franchised dealer for Nashua Corporation (Nashua), which manufactures and distributes such paper and other supplies on a nationwide basis.

Briefly, plaintiff contends that SCM has engaged in various unfair and restrictive practices in unreasonable restraint of trade; has attempted to monopolize interstate trade and commerce in the manufacture, sale and distribution of paper for its electrostatic copying machines; has conspired with its customers, the users of such machines, to monopolize such trade and commerce; has tied-in sales of its electrostatic copying paper and other supplies to its machines, to its service contracts and to its warranties; and at one time tied-in sales of its paper to other necessary supplies.[1]

[1] Elaborate findings of fact proposed by plaintiff and defendant respectively have been made, modified or rejected. This opinion will state only such facts as are necessary to understand the conclusions. If there is any conflict between the facts stated in this opinion and the rulings on the proposed findings of fact, the facts stated in the opinion are intended to control.

Copying Machines

Until recently, the reproduction, duplicating, blueprinting or photostating of documents was usually done by separate business concerns or by specialized units of large organizations. In this decade, however, following the success of the original Xerox copiers, many copying machines designed to produce low-cost copies in relatively small volume have made their appearance, and since 1965 several manufacturers have introduced copier/duplicators, which are much faster than the early copiers.[2]

SCM manufactures and sells under its name and trademark office copying machines which use the electrostatic process under license from Xerox Corporation, the owner of the basic patent.[3] Xerox makes the only copying machines which use the "indirect" electrostatic process.[4] The SCM machines (like those of several other manufacturers)

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[2] In 1967 there were available 59 models by 26 manufacturers or distributors using the electrostatic process; 46 models by 10 manufacturers or distributors using the diazo process; 11 models by 6 manufacturers or distributors using the thermal process; 22 models by 6 manufacturers or distributors using the diffusion transfer process; 5 models by 1 manufacturer using the dual spectrum process; and 4 models by 2 manufacturers or distributors using the dye transfer process.

[3] In the electrostatic process, the surface of the original (i.e., the document or other object to be copied) is exposed to light and reflected onto an electrically charged surface. Where the light strikes the electrically charged surface, the electrical charge is dissipated and an invisible latent image is formed. The latent image is exposed to "toner", which clings to the charged areas and forms a visible image. This image is then fused to the copy paper.

[4] The Xerox copying machines reflect the light from the original onto an electrically charged drum, where the image is formed by brushing with a powder toner. The image is then transferred to the copy paper, which may be ordinary bond paper, although Xerox recommends its own paper. The paper and dry toner used in Xerox machines cannot be used in SCM copying machines.

use the "direct" electrostatic process. Light is reflected from the original onto a coated paper which has been electrically charged. The image is formed on the coated paper by a liquid "toner" and the copy is dried in the machine.

In 1962 SCM introduced its first copying machine, Model 33, a desk top model, capable of making only one copy at a time. Model 44, introduced about 1964, is also a desk top model, but can make multiple copies. Models 66 and 88, introduced in 1967, are similar to Models 33 and 44, but faster.[5] In early 1966, SCM commenced distribution of its Model 55, a console machine which, unlike the other SCM models, is capable of copying from three dimensional objects such as pages of books.[6]

Methods of Distribution

Copying machines are generally available on several bases: (1) purchase from the manufacturer or an authorized distributor; (2) lease, involving a sale by the manufacturer to a leasing concern, and a lease or a conditional sale by the leasing concern to the user; (3) rental from the manufacturer, which may be on: (a) the "machine click" basis, used by Xerox, i.e., a charge for each use of the machine to make a copy, the paper and toner being bought separately from Xerox or others; or (b) the "copy service" basis, used by SCM for its Model 55, i.e.,

[5] In all of those copiers the original is fed into the machine, copies are formed, the original is returned and the copies are ejected.

[6] The original does not enter the Model 55, but remains on a glass plate on the top of the machine; the entire original image is reflected onto the copy paper at one time rather than through use of a scanning device.

a charge for each use of the machine, including paper and toner, which are supplied by SCM as needed.

Competition—Machines

The manufacturers and distributors of office copying machines are in active competition with each other. The competition continues even after one of the manufacturers or distributors has rented or sold a machine to a customer, because the customer can often be persuaded to rent a different type of machine or to trade-in a machine which he owns.

The several machines have various advantages and disadvantages. Xerox has been the leader. SCM has never acquired more than 3 or 4 percent of the office copying business, whether measured by the number of machines sold or rented, or by the total annual number of copies made on the several brands of machines.[7]

Competition—Paper and Replenisher

The sale of supplies, particularly paper, for use with their copying machines, is an important source of profit to the several manufacturers, often exceeding the profit from the machines themselves.[8]

The copying machines which operate on the direct electrostatic process (SCM, Bruning, Apeco, Dennison and a few

[7] In 1967 the sheets of paper sold by SCM in relation to total copies produced on all brands of machines using the "direct" electrostatic process was about 13 percent, a figure which has been shrinking for several years. Dennison and Bruning have now passed SCM.

[8] The sale of paper for use in SCM and some other copying machines is so profitable that plaintiff and other Nashua dealers can afford to furnish free service to their customers, unless such service is made unreasonably expensive by restrictive or other improper practices on the part of the manufacturer.

others) utilize a specially coated paper. Most of those manufacturers produce or purchase and sell paper, which, although designed particularly for their own machines, may be used with generally satisfactory results in other machines employing the direct electrostatic process. Several paper manufacturers, including Nashua, also produce coated paper suitable for use in these machines.

The desirable qualities for such paper, including paper for use in SCM machines, are numerous and to some extent antithetical; e.g., for storage and other purposes, the lighter and thinner the paper the better, but if it is too light or thin, it is likely to cause paper jams in the machines. Among the characteristics for which SCM tests paper are thinness, stiffness, tackiness, adhesion and conductivity.[9] All usable papers are the result of some design compromises.

From the time it introduced its first machines until 1967, SCM purchased all the coated paper which it sold.[10] During 1965 and 1966, SCM purchased some paper from Nashua for sale in Canada.

Although some coated paper sold by others has not been suitable for use in SCM machines, the paper manufactured by Nashua and sold by it and by plaintiff has always been at least as suitable as SCM paper for use in SCM machines, and often has been better for many purposes than SCM paper, although for copying certain kinds of originals SCM paper has been better. Nashua paper has been

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[9] Paper that lacks the proper conductivity—i.e., which takes a charge in the charging unit or discharges the charge in the exposure unit too quickly or too slowly—will produce unsatisfactory copies.

[10] Mostly from Plastic Coating and Crown Zellerbach. In August 1967, SCM began purchasing some base stock, which it coated in its own facilities.

no more likely to cause jams than SCM paper and is not likely to damage the SCM machines because of flakiness or for any other reason.

The solution containing positively charged carbon particles which adhere to the electrostatic copying paper to form a legible image is generally referred to as "replenisher".[11] In 1961 the Microstatics Division of SCM developed a formula for replenisher, which was manufactured for SCM by a contractor until early 1967, when SCM itself began to produce replenisher. Nashua purchases from other suppliers the replenisher which plaintiff sells. That replenisher will not harm SCM machines.

In 1965 SCM sold about 80% of the supplies (paper and replenisher) used in SCM machines; in 1966, including the Model 55, about 75%; and in 1967, about 70%.

Restrictive Policies and Practices

In 1962, when SCM introduced its first copying machine, it sold its paper and replenisher separately. In late 1963 and early 1964, however, competitive brands of electrostatic copying paper began to appear and to threaten the natural monopoly which SCM had theretofore enjoyed in the sale of paper for its own machines. In early 1964 SCM instituted certain practices, primarily to meet that competition.

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[11] Except in the Model 55, replenisher for SCM machines is contained in a plastic cartridge with a valve, which is inserted into the top of a tray containing a petroleum distillate known as "dispersant". The Model 55 is designed to accept the same type of replenisher which is packaged in a metal aerosol can with a patented valve. When the valve on the replenisher cartridge is activated, a small measured amount of replenisher is discharged into the dispersant. The dispersant and replenisher are mixed together by a pump and the mixed solution is known as "toner".

Replenisher. In February 1964, SCM adopted a policy that replenisher should be purchased only with SCM paper; one cartridge of replenisher was furnished with each 5,000 sheets of paper. Previously SCM had sold replenisher at a price of $1.75 per cartridge. In April 1964 the policy was again changed. Replenisher could be purchased separately at $45.00 per half-pint cartridge of $85.00 per pint, but was provided without additional charge when SCM paper was purchased. Sometime in 1964 other toners appeared on the market. In March 1965 the price of replenisher was cut in half, to $22.50 per half-pint cartridge, and was reduced to $7.50 per half-pint in the summer of 1967.

Sale of Machines. SCM has continually sought to prevent sales of its copiers directly or indirectly to "paper merchants", such as plaintiff, who need them in order to compete more effectively with SCM in the sale of paper for use in SCM machines.[12]

Parts. SCM has always supplied or sold parts in connection with SCM service to the owners or renters of machines, but when plaintiff has attempted to purchase parts for use on the SCM machines which it was servicing for its customers it has from time to time been subjected to delays which forced it to purchase several second-hand SCM machines and dismantle them in order to obtain parts, although plaintiff was able to purchase some parts from

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[12] The paper business was so profitable that competitive dealers have been willing to loan or rent machines at reduced prices in order to obtain a customer's paper business. Competing paper salesmen who furnish service to their customers also need machines to break up for parts, but naturally prefer to purchase used machines for that purpose.

Nashua.[13] Plaintiff's difficulty in obtaining parts was used as a sales tool by SCM supply salesmen.

Service. A customer is given service by SCM without additional charge under SCM's rental and copy service programs. One who purchases a machine from SCM is given free service in accordance with the terms of SCM's guarantees. For customers who have either purchased their machines or leased them from a leasing company, SCM provides service on either a time-material basis or under a "service agreement". In its service agreement SCM undertakes, on the basis of a single annual charge, to provide an unlimited number of service calls during the duration of the agreement, to make regular inspections, and to replace free of charge all defective parts except drive-motors and lamps.

Before April 15, 1963, the SCM service agreement contained no clause relating to the use of competitive supplies. Immediately after competition developed in the sale of paper, SCM modified its service agreement by adding the following paragraph: "6—This agreement shall not apply to any repairs made necessary by the use in this machine of Microstatic Dispersant, Replenisher and Electrostatic Copy Paper made by other than SCM and not approved by SCM for use in SCM equipment." This clause was added

[13] From 1962 through 1964, it was the SCM policy to sell parts only to owners of machines who certified that they would not resell the parts. In 1965 the policy was modified; parts in stock in SCM branches were to be used only for repairs by SCM servicemen; other orders were to be sent to Skokie, Illinois. In July 1966, it was announced that any parts in local stocks not needed to take care of SCM's own service requirements could be sold to a customer who executed a certificate of ownership and usage. In December 1966 minimum and maximum limits on orders to be filled from local inventories were established. These policies were not always enforced in Baltimore, and some parts were sold to plaintiff.

at the insistence of the sales department; the service department did not know whether competitive supplies would cause a service problem. In October 1963, SCM's National Sales Manager wrote its National Service Manager that "we should make the sales department feel that we are cooperating with what weapons we have in terms of a service activity to discourage competitive activity in the paper supply area". In March 1964, the National Sales Manager wrote the Western Zone Director: "* * * However, we absolutely must not, under any conditions, provide service under either a contract or warranty at no charge when competitive supplies are being used. We have to take a very stiff position in this area." The clause in the service agreement was used as a tool to coerce customers to purchase SCM supplies.

In August 1964, SCM adopted a new form of service agreement. In addition to the repairs clause, quoted above, it contained a termination clause which provided: "* * * we must reserve the right to suspend this agreement as to any machine in which other suppliers' paper or other supplies have been used."

It was the policy of SCM in 1965 to suspend the service agreement when competitive supplies were used and to render service on a per call basis at a charge of approximately $8.50 per call.

SCM's present service agreement contains the following clauses:

> "8. *Photocopy Equipment.* Because SCM photocopy machines are designed to give excellent performance with SCM photocopy supplies, including Microstatic Dispersant, Replenisher, and Electrostatic Copy Paper, SCM reserves the right to suspend this agreement as

to any machine in with [sic.] other suppliers' paper or other supplies have been used.

"9. *Photocopy Equipment.* This agreement shall not apply to any repairs made necessary by the use in SCM photocopy machines of dispersant, replenisher, electrostatic copy paper or other photocopy supplies made by other than SCM and not approved by SCM for use in SCM equipment."

SCM has never approved any paper, other than paper sold by SCM, for use in SCM machines, despite the fact that the responsible SCM officials know that Nashua paper is safe and as effective as SCM paper for such use.

Since 1965, SCM has not terminated the agreements nor charged customers for repairs unless it could prove that the non-SCM supplies did in fact cause damage. However, since 1965, SCM employees, usually salesmen, but sometimes servicemen, with the knowledge and approval of their superiors, have threatened cancellation of service contracts in Baltimore and elsewhere because of the use of Nashua supplies, and plaintiff has been damaged by such threats in the Baltimore area.

Rental Agreements. Similarly, it has been the policy of SCM from at least as early as August 1965 to threaten the cancellation of rental agreements with customers who use competitive supplies in their SCM machines.[14]

Model 55. From the time of its introduction and first sales to the public in the first part of 1966 until March 1967, the Model 55 was available only on the copy service

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[14] The rental agreements permit cancellation on 15 days' written notice by either party.

basis.[15] Since the per copy charge includes the cost of the SCM supplies, the copy service plan forecloses competition for such supplies, including paper.

SCM offered testimony that its copy service plan was designed to enable the Model 55 to compete with the Xerox 914, a book copying machine which has been distributed almost entirely on a metered basis.[16] However, the Xerox "meter click" plan does not include supplies in the charge, and it has not been shown that Bruning, Dennison and other manufacturers of machines using the direct electrostatic process include paper in their rental charge.

Since March 1967, largely at the insistence of the purchasing agency of the Federal Government (GSA), SCM has offered to sell its Model 55 copiers, but few have been purchased.[17]

Plaintiff has discovered Model 55's under copy service at eight locations where plaintiff was selling electrostatic supplies, general office supplies or both, but the copy service plan has denied plaintiff the right to compete for the sale of paper to be used in those machines.

Sabotage and Misrepresentations. Plaintiff claims that SCM paper salesmen and servicemen have committed vari-

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[15] Essentially, the customer pays a single charge on the basis of the number of copies run on the machine as recorded by a meter; supplies and service are included on the single charge. The arrangement is terminable by either party on one month's notice.

[16] The Dennison and Bruning book copiers are also distributed on a metered basis.

[17] In the ten months after the sales price was first announced, SCM sold approximately 100 Model 55s to commercial users, and approximately 10 Model 55s to the federal government at slightly lower government rates. No Model 55 has been sold in the Baltimore area, although at the time of trial, SCM was negotiating for the sale of the machine with at least one customer in this area.

ous acts of sabotage on the SCM machines of plaintiff's customers who were using Nashua paper and replenisher and have then blamed the Nashua paper for the inability of the machines to produce satisfactory copies. Most of the alleged acts of sabotage were not proved, but the facts set out in the next two paragraphs were proved.

From time to time, SCM's paper salesmen, after having run off a satisfactory copy on SCM paper, set the shutters on the machines in a position where no satisfactory copy could be produced on any paper, ran off an unsatisfactory copy on Nashua paper, and placed the blame for the unsatisfactory copy on the quality of the Nashua paper, deliberately and dishonestly, in an effort to induce the customer by means of such misrepresentation to stop using Nashua paper and to buy SCM paper.[18]

When SCM's paper salesmen and servicemen found that the machines in which Nashua paper was being used were not producing satisfactory copies because of some fault of the machine or because of an accident not caused by the paper or other supplies, they nevertheless blamed the Nashua paper, deliberately and dishonestly, in an effort

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[18] The interior shutter in the Models 33 and 44 electrostatic copying machine regulates the amount of light which is projected upon the charged electrostatic copying paper. The setting of the shutter is controlled by a dial on the exterior of the machine which has a setting range from "0" to "10". A higher number setting on the exterior shutter dial lowers the shutter, allows more light to be reflected upon the paper and makes the copy lighter. Conversely, a lower number setting on the exterior shutter dial raises the shutter, allows less light to be reflected upon the paper and makes the copy darker. If the exterior shutter dial is turned from "0" to "10", the interior shutter will move approximately 40 to 45 degrees.

If the interior shutter is moved to a position approximately 40 to 45 degrees below the proper setting, a copy with a mottled gray area in the center will be obtained. The gray area is caused by the shutter's interference with the reflection of the image.

to induce the customer by means of such misrepresentation to stop using Nashua paper and to buy SCM paper.

Attempt and Conspiracy to Monopolize

As noted above, plaintiff claims that SCM has attempted to monopolize interstate trade and commerce in the manufacture, sale and distribution of paper for its copying machines, and has conspired with its customers, the users of such machines, to monopolize such trade and commerce, in violation of section 2 of the Sherman Act, 15 U.S.C.A. 2.

These claims require a consideration of the relevant market. Plaintiff claims that the relevant market is the market for paper to be used in SCM machines; indeed, plaintiff claims that the market for such paper in the Baltimore metropolitan area and the sale of such paper to the federal government are separate relevant markets. On the other hand, defendant claims that the relevant market is the entire office copying market, in which 40 manufacturers compete for the sale or rental of machines,[19] and most of those manufacturers and many independent paper companies and distributors compete for the sale of paper to be used in the various machines.

In a broad sense, there is keen competition among all those concerns, with Xerox the undoubted leader, and SCM struggling to hold its 3 or 4 percent of the business against an increasing number of competitors. The copying machines of the various manufacturers are reasonably interchangeable, within the meaning of such cases as *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *du Pont & Co.*, 351 U.S. 377 (1956).

SCM possesses no power to monopolize that broad market. Practically, however, certain submarkets must be

[19] See note 2, above.

recognized. *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962); *United States* v. *Grinnell Corp., supra.*

The sale of coated paper for use in the machines which employ the "direct" electrostatic process is such a submarket. In that submarket some manufacturers, e.g. Bruning and Dennison, sell paper for use not only in their own machines but for use in SCM and other brands as well, and a number of paper companies, including Nashua, sell paper throughout the country suitable for use in most if not all of the machines using the "direct" electrostatic process, of whatever manufacturer. SCM has not attempted to monopolize that submarket, and lacks power to make such an attempt; it sells paper only for use in its own machines; it sells less paper than Bruning or Dennison, and is faced with strong and increasing competition both in the sale of machines and in the sale of paper.

When SCM introduced its first machine it had a natural monopoly for a few months of the sale of paper and other supplies for use with that machine. But competition quickly developed for the sale of paper, and by 1965 for replenisher. The evidence shows that SCM has attempted by various means to keep for itself the sale of paper for use in its own machines. If paper for use in SCM machines is a relevant market, which one may attempt to monopolize in violation of section 2 of the Sherman Act, SCM has made such an attempt. But the facts in this case do not show that the relevant market should be defined in such unrealistically narrow terms. The relevant submarket is the sale of coated paper for use in SCM and other machines which employ the direct electrostatic process. *United States* v. *du Pont & Co.,* 351 U.S. 377, 391-393 (1956); *Nelligan* v. *Ford Motor Co.,* 262 F.2d 556, 557 (4 Cir. 1959). See also *United States* v. *Grinnell Corp.,* 384 U.S. 563 (1966);

Walker Process Equipment, Inc. v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).

The Court finds that SCM has not attempted to monopolize any relevant market.

Even if we should assume that a seller may conspire with an ultimate consumer to violate section 2 of the Sherman Act,[20] there was no such conspiracy here.

The Court concludes that no attempt to monopolize or conspiracy to monopolize in violation of section 2 of the Sherman Act has been proved.

Tie-ins and Contracts in Unreasonable Restraint of Trade

Even though SCM may not have sufficient power to attempt to monopolize any part of the trade or commerce among the several states, in violation of section 2 of the Sherman Act, it may have sufficient economic power to permit it to use its rental agreements, service agreements, warranties and replenisher as tying products or vehicles to coerce the sale of paper.[21] The question is, whether

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[20] None of the cases cited in the second paragraph of note 6 in *Albrecht* v. *Herald Company*, —— U.S. —— (1968), was a section 2 case, and none involved customers who were ultimate consumers. In *Albrecht*, the subscribers were presumably interested in getting their newspapers as cheaply as possible. In the instant case no reason has been suggested why the purchasers of paper who were cajoled by misrepresentations to stop buying plaintiff's paper and to buy SCM's instead could have become conspirators with SCM, with the attendant liabilities of conspirators, when the object of the alleged conspiracy was to force them to give up buying supplies which they preferred.

[21] Once a customer has purchased or rented an SCM copying machine, he is usually interested in obtaining service from "factory-trained personnel"; if he has purchased the machine he is almost always interested in the warranties; if he is renting the machine, having selected it in preference to others, he is usually interested in continuing the rental arrangement; in any event he must be able to obtain replenisher as well as paper.

they were so used, in violation of section 3 of the Clayton Act, 15 U.S.C.A. 14, or section 1 of the Sherman Act, 15 U.S.C.A. 1.

Section 3 of the Clayton Act deals only with the tie-in of one commodity to another; it does not deal with the situation where a commodity is tied to a service. Such a tie-in, however, may be an unlawful restraint of trade under section 1 of the Sherman Act. *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 554 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961).

Plaintiff contends that SCM: (a) tied-in paper and supplies with the sale of its machines and with the guaranty accompanying the sale; (b) tied-in paper and supplies with the rental of its machines; (c) tied-in paper and supplies with its service agreements; and (d) tied-in paper to toner.

To establish an illegal tying arrangement, plaintiff must show: (1) the forced purchase of one commodity in order to obtain a separate desired commodity or service; (2) possession by the seller of sufficient economic power with respect to the tying product to restrain free competition in the market for the tied product; and (3) that a not insubstantial amount of interest commerce in the tied product is affected. *Northern Pacific Ry.* v. *United States*, 356 U.S. 1 (1958); *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961); *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594 (1953); *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962); *United States* v. *International Business Machines Co.*, 13 F. Supp. 11 (S.D. N.Y. 1935), aff'd 298 U.S. 131 (1936); *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832 (4 Cir. 1960), cert. den. 366 U.S. 963 (1961); *Dehydrating Processing Co.* v. *A. O. Smith Corp.*,

292 F.2d 653 (1 Cir. 1961), cert. den. 368 U.S. 931 (1961); *Susser* v. *Carvel Corp.*, 206 F. Supp. 636 (S.D. N.Y. 1962), aff'd 332 F.2d 505 (2 Cir. 1964), cert. dismissed, 381 U.S. 125 (1965).

The third element exists in this case, even if we consider only the sales in Maryland of paper for use in SCM machines. Defendant disputes the existence of the other two elements with respect to each of the alleged tie-ins.

It is not necessary that a tying arrangement expressly require the buyer to purchase the tied product in order to obtain the tying product or service. The arrangement may be supplemented and enforced by threats or other coercive practices. *McElhenny Co.* v. *Western Auto Supply Co.*, 269 F.2d 332, 338 (4 Cir. 1959); *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832 (4 Cir., 1960), cert. den. 366 U.S. 963 (1961); *United Shoe Machinery Co.* v. *United States*, 258 U.S. 451, 457, 458 (1922); *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962). See also *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 382 (1967).

(a) Tie-in of Paper and Supplies to the Sale of Machines and to the Guaranty Accompanying the Sale. SCM has always offered its desk-top models, 33, 44, 66 and 88, for sale to the public at prices not shown to have been unfair, without any requirement that the purchasers buy or use its paper or other supplies. Nor have any such restrictions been imposed when the copying machine was sold to a leasing company and leased by that company to the customer. When Model 55, the console model, capable of copying pages from a book was introduced in late 1965, it was offered only on a copy service basis, including paper and toner. That arrangement will be discussed in the next paragraph. Model 55 was offered for sale in March 1967, without any requirement that the purchasers buy or use

SCM paper or other supplies. There has been no tie-in of paper and supplies to the sale of machines. Nor has plaintiff proved any tie-in of paper and supplies to the guaranty accompanying the sale.[22]

(b) Tie-in of Paper and Supplies to Machine Rentals. Model 55. The copy service basis[23]—the only basis on which the Model 55 was supplied until March 1967 and the basis on which it is generally supplied now—involves an illegal tie-in of paper and replenisher to the rental of the machine, unless it can be justified in one or more of the ways suggested by the defendant.

SCM argues first that the copy service agreement consists of the sale of a single product—copies—for a single unit price, and that in order that there be an illegal tie-in, there must be two distinct products, citing *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, at 614. The facts with respect to the market, discussed above under the heading Attempt and Conspiracy to Monopolize, the fact that Xerox does not include paper in its copy service agreement, and the absence of any proof that Bruning, Dennison and other manufacturers of machines using the

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[22] The SCM guaranty certificate contains the following provision:

"SCM warrants each new SCM Coronastat electrostatic copier to be free from defects in materials or workmanship for a period of 90 days from date of delivery. Any part which proves defective within this period will be replaced without charge. The warranty does not apply: (i) to damage resulting from accident, neglect or misuse, including repairs made necessary by the use of supplies made by any firm other than SCM and not approved by SCM for use in SCM Coronastat electrostatic copiers, or (ii) if the machine is repaired by anyone other than an SCM authorized repairman."

The exceptions are reasonable on their face, and were not shown to have been used coercively.

[23] See note 15, above.

direct electrostatic process include paper in their rental charge, show that the rental of machines and the sale of paper are recognized as separate items and not as a single product. See *Times-Picayune Pub. Co.* v. *United States, supra,* and *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961), reh. den. 365 U.S. 890.

SCM then argues that even if the rental of machines and the sale of paper are recognized as separate items, they may be offered as a combination at a unit price, if they are also available separately, and that since March 1967 Model 55 has been available for purchase separately without any requirement that the purchaser buy SCM paper. It has never, however, been available for rental without that requirement, the principal purpose of which is to force the purchase of SCM paper. Since the paper used with the Model 55 does not run through rollers and other devices in the machine, and therefore cannot cause paper jams, the tie-in cannot be justified on that ground. The Court concludes that the availability of the Model 55 for purchase does not prevent the copy service agreement from being an illegal tying device, in unreasonable restraint of trade, unless and until the Model 55 is also offered for rental on a reasonable basis without the requirement that SCM paper be purchased.

Finally, SCM argues that the copy service arrangement was justified, at least until March 1967, on the ground that the Model 55 was a new product introduced by a small competitor into a field dominated by Xerox, and as such was entitled to the benefit of the new product defense, recognized in *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545, 556-558 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961). See also *General Talking Pictures*

Corp. v. *American Tel. & Tel. Co.*, 18 F. Supp. 659 (D. Del. 1937); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). It is not necessary to pass on this point, because plaintiff has not proved any damage to it with respect to any Model 55 prior to March 1967.

Other Rental Agreements. SCM rents its other office copying machines under written rental agreements, which contain no prohibition against a customer using non-SCM paper and supplies. The only paragraph which mentions non-SCM supplies reads as follows:

> "User understands that all machines remain the property of SCM and User agrees that (a) the machines will not be altered or serviced by anyone other than an authorized SCM repairman, (b) supplies which may cause damage or deterioration will not be used in the machines, and (c) the machines will not be moved from place of initial installation without receiving prior written approval from SCM."

Nashua supplies have been used on some rental machines in the plaintiff's market area, and there is no evidence that any rental agreements were terminated because of the customer's use of the Nashua supplies. The quoted clause in the rental agreement is not itself unlawful,[24] but SCM employees have threatened to cancel rentals if Nashua supplies are used and have misrepresented the likelihood of damage by the use of such supplies.

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[24] *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949); *Susser* v. *Carvel Corp.*, 206 F. Supp. 636 (S.D. N.Y. 1962), aff'd 332 F.2d 505 (2 Cir. 1964), cert. dismissed, 381 U.S. 125 (1965); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), aff'd per curiam 365 U.S. 567 (1961).

As noted above, the precise language of the clause in the rental agreement is not controlling if the clause, reinforced by the conduct of the lessor, has been used to coerce lessees.[25]

(c) Tie-in of Paper and Supplies with the Service Agreement. The facts with respect to this tie-in are set out above, under the heading "Restrictive Policies and Practices", subheading "Service". See also the subheadings "Parts" and "Sabotage and Misrepresentations".

Although the provisions of SCM's service agreements, which are quoted above, are not unreasonable on their face, they have been used by SCM's employees to coerce customers to stop using Nashua paper and other supplies sold by plaintiff and to use only SCM paper and supplies, in violation of section 1 of the Sherman Act. SCM employees, usually salesmen, but sometimes servicemen, with the knowledge and approval of their superiors, have threatened cancellation of service contracts in Baltimore and elsewhere because of the use of Nashua supplies, and plaintiff has been damaged by such threats in the Baltimore area. Those threats have been reinforced by the shutter sabotage and the deliberate and dishonest disparagement of plaintiff's product by SCM paper salesmen, as outlined under the subheading "Sabotage and Misrepresentations", above.

The antitrust laws do not require SCM to furnish service at a flat rate under its service agreement when other

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[25] *McElhenny Co.* v. *Western Auto Supply Co.*, 167 F. Supp. 949 (W.D. S.C. 1958), aff'd 269 F.2d 332 (4 Cir. 1959); *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832 (4 Cir. 1960), cert. den. 366 U.S. 963 (1961); *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451 (1922); *United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal. 1951); *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962).

than SCM supplies are used, provided SCM is willing to furnish service in such cases at a fair rate on a time and material basis. But the antitrust laws do not allow SCM to misrepresent the effect of the agreement or the reasons for malfunctioning of the machines as part of a plan to force customers to abandon the use of competing supplies which do not damage the machines.

(d) Tie-in of Paper to Toner. This was done literally during a few months in 1964. Thereafter, toner and paper were offered for sale separately, but the toner was offered at an unreasonably high price, intended to effect a practical continuance of the tie-in. The price has been lowered twice, and plaintiff has not shown that the present price is unreasonable or that plaintiff has been damaged by any continuing tie-in, if one exists.

Each side charges the other with unfair business practices which do not amount to violations of the antitrust laws, but no such practices have been proved which would justify an award of damages or an injunction against either the defendant or the plaintiff in this case, or which would constitute a defense to the claims alleged and proved by plaintiff.

Damages

Plaintiff has been damaged by SCM's threats to cancel rentals and service agreements if the paper or other supplies sold by plaintiff were used in SCM machines, aggravated by SCM's shutter sabotage, by SCM's deliberate misrepresentations and false disparagement of plaintiff's paper and other supplies, and to a lesser extent by SCM's parts policy.

It has been practically impossible for plaintiff to show exactly what sales it lost as a result of SCM's restrictive practices; but the Supreme Court and other federal courts have allowed plaintiffs considerable leeway in proving damages in antitrust cases. *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251 (1946); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Thomsen* v. *Cayser*, 243 U.S. 66 (1917); *Chattanooga Foundry & Pipes Works* v. *City of Atlanta*, 203 U.S. 390 (1906); *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F.2d 416 (10 Cir. 1952), cert. den. 344 U.S. 837 (1952); *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F.2d 709 (9 Cir. 1959). Cf. *Glen Cove Co.* v. *Dickinson Fuel Co.*, 72 F.2d 885 (4 Cir. 1934).

Plaintiff's loss, measured by lost sales and other recoverable items, would have been much greater but for the aggressiveness and resourcefulness of plaintiff's president, Alan Elkin, who promptly organized a service department and took other steps to mitigate the effect of SCM's practices. Even without the threats of cancellation made by SCM employees, plaintiff would probably have established by early 1967 its own service department to service the machines of its paper customers, SCM and others, but such threats hastened the establishment of plaintiff's service department and cost plaintiff an appreciable amount of money it would not otherwise have spent in the early years of its operation.

Plaintiff claims four items of damage: (1) the cost of maintaining its service department; (2) the time spent by plaintiff's president, Alan Elkin, in servicing and mollifying plaintiff's customers because of SCM's threats and other restrictive practices, which could have been spent in other work profitable to plaintiff; (3) loss of sales; and (4) lost

rental on machines "cannibalized" to provide parts used in service to plaintiff's customers.

The prompt organization of plaintiff's service department enabled it to hold customers it would otherwise have lost, and to replace with new customers some of those it did lose because of SCM's restrictive practices.

All factors considered, the Court has concluded that the fair measure of damages to plaintiff in this case is the reasonable cost of furnishing service to those customers of plaintiff who purchased paper and other supplies for use in SCM machines, plus the value to plaintiff of Elkins' time spent in offsetting defendant's restrictive practices. The sum of those two items fairly covers plaintiff's actual damages, including the small loss of specific sales which plaintiff proved and the probable loss of some sales of paper for use with the few Model 55 machines proved to have been on copy service in Baltimore. The small amount of damages claimed for lost rental on machines used to provide parts is not recoverable, because SCM's parts policy did not violate the antitrust laws.

Plaintiff's service department was also used to service other machines besides SCM machines, and plaintiff concedes that a deduction from its total costs should be made each year on that account. The Court finds that plaintiff should recover 90% of the cost of its service department for the year 1965, 75% for the year 1966, and 60% for the year 1967. Allowing most of the wages of one serviceman for three quarters of 1965 and all of 1966 and 1967, half of the clerical expenses claimed, with payroll taxes on both, the auto expense claimed, no rent, but most of the small general overhead claimed, the Court finds the expense of the service department which should be included in plain-

tiff's damages to be $5,155 for the year 1965, $5,445 for the year 1966, and $4,914 for the year 1967, a total of $15,514.

The time spent by plaintiff's president, Alan Elkin, in servicing and mollifying plaintiff's customers as a result of the threats, sabotage and misrepresentations by SCM employees, found above, which he could have spent in other activities of greater benefit to plaintiff, amounted to 75 hours at $16 per hour; a total of $1,200.

The sum of those two items is $16,714, which should be trebled, making the amount of the award $50,142.

Other Relief

Plaintiff is also entitled to an injunction against the Model 55 tie-in, and against any further deliberate misrepresentations by SCM employees attributing the cause of malfunctioning of SCM machines to competitive supplies, in an effort to prevent customers from using such competitive supplies.[26]

Finally, plaintiff is entitled to its reasonable attorneys' fees, to be fixed by the Court, after a further hearing.

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Chief Judge, U.S. District Court

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[26] Of course, SCM will not be prevented from proclaiming the virtues of its own supplies or warning against the danger of using, in its machines, supplies which its employees believe in good faith may damage the machine. *International Business Machines Corp.* v. *United States*, 298 U.S. 131, 139 (1936).

APPENDIX B

APPENDIX B

Supplementary Opinion of the District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

CIVIL NO. 18259

ADVANCE BUSINESS SYSTEMS & SUPPLY COMPANY,
a body corporate of the State of Maryland,

v.

SCM CORPORATION, a body corporate
of the State of New York.

SUPPLEMENTARY OPINION, FILED JULY 11, 1968.

I. Geographical Scope of Injunction.

After the principal opinion in this case was filed, a hearing was held to consider drafts for a final judgment presented by the respective parties, particularly the geographical scope of the injunction to be entered with respect to the distribution by SCM of its Model 55 or any other copying machine on the copy service basis or on any other basis which requires the customer to buy or use SCM supplies. Plaintiff seeks an injunction national in scope. SCM argues that the injunction should be limited to the State of Maryland, the only state where plaintiff is

franchised to sell Nashua paper, where almost all of its sales are made, and the only state where it has suffered or is threatened with loss or damage by SCM's violation of the antitrust laws.

Under 15 U.S.C.A. 26, a corporation is entitled to have injunctive relief "against threatened loss or damage by a violation of the antitrust laws".

The applicable rule was stated by the Supreme Court in *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954), as follows:

> "Section 15 of the Clayton Act, 15 U.S.C. §25, charges the United States district attorneys, under supervision of the Attorney General, with the duty of instituting equity proceedings to prevent and restrain violations of certain of the antitrust laws, including price discrimination. Under §16 of the Act, 15 U.S.C. §26, a private plaintiff may obtain injunctive relief against such violations only on a showing of 'threatened loss or damage'; and this must be of a sort personal to the plaintiff."

See also *Dollac Corp.* v. *Margon Corp.*, 164 F. Supp. 41, 65 (D. N.J. 1958), aff'd, 275 F.2d 202 (3 Cir. 1960); *Revere Camera Co.* v. *Eastman Kodak Co.*, 81 F. Supp. 325, 331 (N.D. Ill. 1948).

A nation-wide injunction is not supported by the facts proved at the trial nor by the authorities plaintiff has cited.

II. Attorney's Fee

Plaintiff seeks allowance of an attorney's fee for the Baltimore firm which prepared and tried the case, based upon 931 hours of two partners' time at $40 an hour and

1,683 hours of several associates' time at $25 an hour, a total of $79,315, of which plaintiff seeks to recover $60,000.[1]

Defendant does not dispute that plaintiff's attorneys spent the time stated, and does not dispute the reasonableness of the hourly rates, but contends that attorneys' fees must bear "a relationship" to the amount of single damages recovered, are rarely awarded in excess of the single damages allowed, and cannot be allowed for time spent in unsuccessful efforts to obtain recovery or in defending a counterclaim or in seeking an injunction. Defendant also contends that there was "duplicative staffing" with two, three or four lawyers attending depositions and parts of the trial, and that plaintiff received assistance and encouragement from Nashua and its attorneys.

In *Noerr Motor Freight, Inc.* v. *Eastern Railroad Presidents Conference,* 166 F. Supp. 163, 168-169 (E.D. Pa. 1958), aff'd 273 F.2d 218 (3 Cir. 1959), rev'd on other grounds, 365 U.S. 127 (1961), Judge Clary listed some of the factors which have been considered in setting a reasonable attorney's fee. They include: (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the government, (2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel, (3) time and labor spent, (4) magnitude and complexity of the litigation, (5) responsibility undertaken, (6) the amount recovered, and (7) the knowledge the court has of the conferences, the arguments presented and the work shown by the record to have been done by the plaintiff's attorneys prior to trial. Judge Clary also discussed two other suggested tests: (8) what it would

[1] Plaintiff also asks an award of $875 for services of out-of-town attorneys, to which defendant has made no objection.

be reasonable for counsel to charge a victorious plaintiff, and (9) what contribution shall be made by the defendant toward the fees of plaintiff's counsel. In *Twentieth Century Fox Film Corp.* v. *Goldwyn,* 328 F.2d 190, 221 (9 Cir. 1964), the Court said that while most of the factors listed by Judge Clary are useful as guides, they do not provide a precise yardstick; that while such fees are usually fixed at a level substantially below the amount of actual damages awarded, there are cases in which the fee exceeded, or very nearly equaled the damage award. In the recent case of *Volasco Products* v. *Fry Roofing Co.*, 346 F.2d 661, 667 (6 Cir. 1965), the Court approved a fee of $50,000 where the actual damages were $25,000, trebled to $75,000.

In *Osborn* v. *Sinclair Refining Co.*, 207 F. Supp. 856, 864 (D. Md. 1962), this Court referred to the factors set out in Canon 12 of the Canons of Professional Ethics of the American Bar Association, which should be considered in determining a reasonable fee in the ordinary case.[2] This Court found, however, that Osborn was an unusual case, that the legal principle established by counsel for plaintiff was an important one, and that one of the purposes of

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[2] Canon 12 reads: "In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service."

private treble damage suits is to prevent the necessity of government civil suits or prosecutions to establish and correct violations of the antitrust laws.[3] In *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 218 F. Supp. 490 (D. Mass. 1963), Judge Wyzanski questioned "whether the allowance of an attorney's fee in excess of the losses sustained can be justified solely on the basis that 'one of the purposes of private treble damage suits is to prevent the necessity of government civil suits or prosecutions to establish and correct violation of the antitrust laws,' * * * inasmuch as the statute does not allow an attorney's fee for procuring an injunction but allows it only as an item of damage when losses have been proved to have been sustained by the plaintiff." 218 F. Supp. at 492-493. In the case at bar plaintiff proved that it has sustained losses. Moreover, the Supreme Court has recently reiterated the importance of private actions "as a bulwark of antitrust enforcement". *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, —— U.S. —— (1968), 36 L.W. 4571, citing *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1962), and *Kiefer-Stewart* v. *Seagram & Sons*, 340 U.S. 211 (1951). An award of attorney's fees should be based upon a consideration of all relevant factors, including the importance of private actions in enforcing the antitrust laws.

In this case plaintiff's counsel did not have the benefit of a prior judgment or decree in a case brought by the government. The standing of plaintiff's counsel and of defendant's counsel is very high. It is conceded that plain-

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[3] On appeal, the Fourth Circuit awarded certain damages which this Court had found the plaintiff had sustained but was not entitled to recover. The Fourth Circuit did not discuss the method of fixing the attorneys' fees; it merely ordered this Court to determine what, if any, additional attorneys' fees should be awarded plaintiff's counsel for their successful prosecution of the second appeal. 324 F.2d 566 (4 Cir. 1963).

tiff's counsel spent the large amount of time claimed in the preparation and trial of the case, but there is merit in defendant's contentions that a considerable part of that time was spent in developing issues and items on which plaintiff failed to prevail,[4] and that there was some unnecessary "duplicative staffing". The case was complex and, as noted in the principal opinion, it was only the resourcefulness of plaintiff's president which kept its losses from being much greater. Plaintiff's Baltimore counsel assumed full responsibility for the litigation, and although the amount recovered was not large, compared to many other antitrust cases, the principles established were important to the development of plaintiff's business. Nashua and its attorneys undoubtedly aided plaintiff and its attorneys in preparing the case, and may have reduced somewhat the hours which would otherwise have been spent by plaintiff's attorneys. Nothing is claimed or awarded herein for services rendered by Nashua's attorneys nor for any services rendered by plaintiff's attorney to Nashua or anyone else except plaintiff.

All factors considered, the Court finds that plaintiff is entitled to recover attorneys' fees in the amount of $35,875.

III. Costs.

Plaintiff has filed herein a proposed Bill of Costs in the amount of $8,918.53. Based on his normal practice, the Clerk has proposed to tax costs in the amount of $397.06, and plaintiff now seeks review of the Clerk's decision.[5]

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[4] No considerable amount of time was spent in defending against the counterclaim.

[5] No judgment has yet been entered, but the parties have waived the formal procedures, and have agreed to treat the Clerk's proposed action as being properly reviewable at this time.

SCM does not contest the Clerk's decision to tax fees of the Clerk ($15.00), fees of the Marshal ($169.36), witness fees ($80.00) and the docket fee ($20.00). SCM also admits that some allowance is proper for producing copies for three books of exhibits prepared at the request of the Court. All other items are disputed.

Rule 54(d), F. R. Civ. P., provides generally that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs". Not every expense of litigation is recoverable. The items which "may" be taxed are found in 28 U.S.C. 1920, 1921 and 1923. Witness allowances are covered by section 1821. Section 1920 is set out in note 6, in the margin.

Plaintiff seeks to expand the usual categories of taxable costs in this case because the Clayton Act, designed to encourage private enforcement of the antitrust laws, allows recovery of "the cost of suit", 15 U.S.C. 15, whereas Rule 54(d) speaks only of "costs". Plaintiff concedes that no court has accepted its contention. In *Twentieth Century Fox Film Corporation* v. *Goldwyn*, 328 F.2d 190, 224 (9 Cir. 1964), the Court held that "the only costs recoverable by a successful plaintiff in a private antitrust suit are those

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[6] "§1920. Taxation of costs

"A judge or clerk of any court of the United States may tax as costs the following:

"(1) Fees of the clerk and marshal;

"(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

"(3) Fees and disbursements for printing and witnesses;

"(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

"(5) Docket fees under section 1923 of this title.

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955."

which are naturally allowable under 28 U.S.C. §1920 and Rule 54(d) * * * ." See also *Straus* v. *Victor Talking Machine Co.*, 297 F. 791, 806 (2 Cir. 1924), and *Brookside Theatre Corp.* v. *Twentieth Century Fox Film Corp.*, 11 F.R.D. 259, 265 (W.D. Mo. 1951).

On the other hand, a trial court possesses broad discretionary powers in the allowance or disallowance of costs within the categories set out in section 1920. 3 Barron & Holtzoff, *Federal Practice and Procedure*, sections 1195, 1197 (1958 ed.); 6 Moore, *Federal Practice*, Par. 54.70[5] (2d ed. 1966). In a private antitrust suit a court should not exercise that discretion niggardly.

(*a*) *Daily Copy of Trial Transcript.* Plaintiff seeks to tax $3,289.00, representing one-half of the cost of the Court's copy of the daily trial transcript and the cost of a copy for plaintiff's counsel.

Sub-section (2) of 28 U.S.C. 1920 provides that a Court may tax as costs: "Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case". In this District, the Clerk does not ordinarily tax the cost of any transcript except the court's copy, and then only when the transcript has been specifically requested by a judge. The trial judge, however, may tax the cost of the transcript in an appropriate case.

The general rule is "that stenographic transcripts are often 'necessarily obtained for use in the case'; and that if they are, rather than a mere luxury or convenience, the trial court in the exercise of a sound discretion *may* tax all reasonable expenses incurred by a prevailing party in obtaining stenographic transcripts both for the Court and himself. This doctrine includes the added expense for a daily transcript when the exigencies of the case warrant; * * * " 6 Moore, Par. 54.77[7], at p. 1375.

In applying this rule, courts have generally considered the length of the trial, the complexity of the issues, whether a daily transcript was necessary to minimize disagreement over the testimony of witnesses, and whether proposed findings of fact were required. See *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 233, 234 (1964); *Independent Iron Workers, Inc.* v. *U. S. Steel Corp.*, 322 F.2d 656, 678 (9 Cir. 1963); *Brookside Theatre Corp.* v. *Twentieth Century Fox Film Corp.*, supra.

In the present case the court reporter approached counsel for plaintiff immediately before the trial, stated that defendant had ordered daily copy, and asked if plaintiff intended to do likewise. Plaintiff's counsel then agreed to order daily copy. The trial lasted four weeks, Court and counsel repeatedly referred to the transcript during the trial, and although the issues were not complex, they were numerous. Moreover, the Court indicated near the outset of the trial that the parties should file proposed findings of fact and follow the "red-blue-yellow" technique.[7] A daily transcript is usually necessary in a non-jury case which lasts more than a week, in which the facts cannot be decided from the bench, and proposed findings and briefs are necessary so that the findings may be made while the testimony is fresh in the judge's mind and the time of counsel as well

[7] Under that technique, counsel exchange three copies of the proposed findings of fact several days before oral argument. Defendant then underlines with a red pencil those portions of plaintiff's proposed findings which he disputes, with blue those he admits, and with yellow those he does not dispute but deems irrelevant. He delivers one marked copy to the court and one to the other side. Plaintiff does the same with defendant's proposed findings. Sometimes an entire proposed finding is underlined in red, sometimes a sentence or only a part of a sentence. At the oral argument counsel discuss all portions underlined in red. This technique points up the argument and saves a great deal of judicial time.

as of the Court may thus be saved. See *Farmer* v. *Arabian American Oil Co.*, supra. Certainly, a daily transcript, with a copy for plaintiff's counsel as well as for the Court, was necessary for use in this case.

(*b*) *Printing Costs.* The Clerk properly held taxable the cost of reproducing the proposed findings of fact required by the Court to be exchanged, and properly disallowed the cost of reproducing plaintiff's briefs. The Clerk allowed the taxable item at too large a figure, since it included a charge for overhead. It should be taxed in the amount of $46.90.

(*c*) *Witness Expense.* Plaintiff seeks allowance of traveling expenses for three out-of-state witnesses. In each instance the requested mileage allowance exceeds 200 miles.

The rates for mileage and per diem set by 28 U.S.C. 1821 are 8¢ per mile for travel, $4 for each day's attendance and $8 per day for subsistence. No limitation on allowable mileage is imposed by the statute, but Rule 45(e) limits the effective range of a subpoena to 100 miles from the place of hearing, and before 1964 many decisions established a flat 100-mile limit. See cases cited in 6 Moore, Par. 54.77[5], n.6, at p. 1363. In *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227 (1964), the Supreme Court refused to "accept either the extreme position of the company that the old 100-mile rule has no vitality for any purpose or Farmer's argument that a federal district court can never under any circumstances tax as costs expenses for transporting witnesses more than 100 miles". 379 U.S. at 232. The Court held that the trial judge was correct in treating the case as an appeal to his discretion, and approved his refusal to allow travel expenses for more than 100 miles from the courthouse. The Court said: "That rule, we think, is a proper and necessary consideration in exercising discre-

tion in this field. The century-and-a-half-old special statutory provision relating to service of subpoenas more than 100 miles from the courthouse is designed not only to protect witnesses from the harassment of long, tiresome trips, but also, in line with our national policy, to minimize the costs of litigation, which policy is strongly emphasized in the Federal Rules of Civil Procedure. Here the company on its own, without prior notice to the court, brought its foreign witnesses to court at its own expense." 379 U.S. 234-235.

In the instant case this Court finds no sufficient justification for exceeding the usual limit. In future cases, our Clerk should adhere to the 100-mile rule, leaving it to the trial judge to increase the allowance in his discretion.[8]

(*d*) *Fees for Exemplification and Copies of Papers Necessarily Obtained for Use in the Case.* (1) Plaintiff seeks to recover under this classification $2,335 for fees of accountants who collected and analyzed data of plaintiff's sales, costs and profits, and prepared charts and schedules setting out that data, which were introduced as exhibits at the trial. It is true that the reasonable expense of preparing maps, charts, graphs and kindred materials is taxable under 28 U.S.C. 1920(4) when necessarily obtained for use in the case. 6 Moore, Par. 54.77[6], at p. 1370. See also, *Hansen* v. *Bradley,* 114 F. Supp. 382, 385 (D. Md. 1953); *Hope Basket Co.* v. *Product Advancement Corp.,* 104 F.

[8] In the *Arabian American Oil* case, the Supreme Court quoted with approval the following statement by Judge Weinfeld: " 'Upon an appropriate motion, the means of obtaining the testimony of the witness would have rested with the Court, which in its discretion, could have imposed conditions with respect to which party initially was to bear the expense and provided for its ultimate taxation in favor of the prevailing party.' 31 F.R.D. 191, 195." 379 U.S. at 235.

Supp. 444, 450 (D. Mich. 1952). But expert witness fees, particularly accountants' fees, are generally not taxable as costs. *Twentieth Century Fox Film Corp.* v. *Goldwyn* (supra, 328 F.2d at pp. 223, 224). The cost of schedules illustrating an accountant's audit has been allowed where they were necessary to a proper understanding of the issues with respect to the profits. *Brookside Theatre Corp.* v. *Twentieth Century Fox Film Corp.*, supra. See also *Freedman* v. *Philadelphia Terminals Auction Company*, 198 F. Supp. 429, 431 (E.D. Pa. 1961).[9] The cost of exhibits which are merely illustrative of or incidental to expert testimony is not taxable. 6 Moore, supra, Par. 54.77[6], p. 1371.

In the case at bar the exhibits in question were not requested by the Court, and they were not necessary to an understanding of the case. The cost of preparing them is not taxable.

(2) Plaintiff also claims $200 for the attendance of one of its accountants at defendant's audit "on equitable grounds". It was understood between the parties that defendant's accountant would require someone in attendance to orient him with plaintiff's books. One of plaintiff's officers or employees could have done this satisfactorily and in a short time. This item is not taxable.

(3) The cost of reproducing documents for authentication, for inclusion in document books, and for introduction at trial is usually recoverable where the copies are necessary for the trial or pretrial. 6 Moore, Par. 54.77[6], at pp. 1368, 1369. The only copying cost allowed by the

[9] The cost of such charts is ordinarily taxable only if their preparation was "necessary in order to have the Court understand what may otherwise have been in the record, but what would have been incomprehensible to the inexpert mind." *Appliance Inv. Co.* v. *Western Electric Co.*, 61 F.2d 752, 756 (2 Cir. 1932).

Clerk in this case was the charge ($18.90) for producing three books of exhibits prepared at the Court's request. SCM concedes the taxability of this item, but disputes the amount of any charge which includes general office overhead of plaintiff's counsel. Although SCM's objection appears picayune, it is well taken, and the figure will be reduced to $9.95. The Court holds taxable some other copying charges claimed, namely, $115.20 for copies of SOS depositions and exhibits, $11.50 for copies of SOS pleadings, introduced as exhibits at the trial, and $160.00 for the cost of paper and a copy-boy hired by plaintiff for the specific purpose of copying documents produced at the office of SCM's counsel and for preparing books of exhibits, as suggested by the Court. The Court refuses to tax other copying charges claimed, amounting to $232.60. The total allowance for copying is therefore $285.65.

(e) Deposition Costs. The taxation of deposition costs is recognized as discretionary. For the past fifteen years our Clerk has followed the principles stated by Judge Chesnut in *Hansen* v. *Bradley,* 114 F. Supp. 382, 385, 386 (D. Md. 1953), which disallowed the cost of depositions which were not introduced in evidence, despite the fact that they may have been used at trial for impeachment purposes. It is now, however, generally recognized by federal courts that deposition transcripts, when reasonably "necessary for use in the case" are taxable under subsection (2) of 28 U.S.C. 1920 as "Fees of the court reporter for * * * stenographic transcript". 4 Moore, Par. 26.36; Peck, *Taxation of Costs,* 37 F.R.D. 481, 487, 488 (1965).

The Court is satisfied that the time has come to bring the practice in the District of Maryland into line with the

majority rule throughout the country. We should consider the extent of actual use of each deposition in cross-examination and otherwise, and whether the taking was reasonably necessary to the party's case in light of the particular situation existing at the time of taking. It is not necessarily fatal to taxation that they were not introduced or otherwise used at the trial. Moore, supra; Peck, supra; *Nationwide Auto Appraiser Serv.* v. *Association of Cas. & S. Co.*, 41 F.R.D. 76, 77 (W.D. Okla. 1966); *Independent Iron Workers, Inc.* v. *United States Steel Corp.*, 322 F. 2d 656, 678, 679 (9 Cir. 1963); *Modick* v. *Carvel*, 209 F. Supp. 361, 364 (S.D. N.Y. 1962); *Talbot-Windsor Corp.* v. *Miller*, 32 F.R.D. 18, 19 (D. Mass. 1962).

Five of the depositions were used by plaintiff in the cross-examination of SCM witnesses at the trial, and three of the five were also used in pretrial motions. The cost of those five depositions, $484.70, should be taxed. Five depositions were used purely for discovery. The cost of those depositions will not be taxed.

Where the party taking a deposition has filed the transcript with the Clerk, the cost of an extra copy is generally deemed to be for the convenience of counsel and not taxable, Peck, supra, 37 F.R.D. at p. 487, although a Court has the power to tax the cost of deposition copies in a proper case. See *Independent Iron Workers, Inc.* v. *United States Steel Corp.*, supra. Where the original deposition is not filed with the Court until the day of trial, the prevailing party may ordinarily recover the cost of a copy of the deposition. See *Cooke* v. *Universal Pictures Co., Inc.*, 135 F. Supp. 480 (S.D. N.Y. 1955). The cost of a copy has also been allowed where reasonably necessary to control an attempt at impeachment. *Hancock* v. *Albee*, 11 F.R.D. 139, 141 (D. Conn. 1951).

SCM took the testimony of Alan Elkin (President and General Manager of plaintiff), Mrs. Elkin (Secretary and Office Manager of plaintiff), a serviceman, a salesman, and a man employed by plaintiff in both sales and service. The originals of these transcripts were not filed with the Clerk. Plaintiff's counsel could fairly anticipate that defendant would make a strong effort to impeach the testimony of those witnesses. Defendant's deposition of Alan Elkin extended for 1,086 pages, and represents more than 80% of the costs claimed for copies of defendant's depositions. Those copies were "reasonably necessary" and taxable, because necessary to control the attempted impeachment; they should be taxed in the amount of $520.00, making total deposition costs $1,004.70.

In summary, the following costs will be taxed: Fees of the clerk, $15.00; Fees of the marshal, $169.36; Daily copy of trial transcript, $3,289.00; Printing costs, $46.90; Witness fees, $80.00; Exemplification and copies of papers necessarily obtained for use in the case, $285.65; Docket fee, $20.00; and Deposition costs, $1,004.70. The total taxable costs are therefore $4,910.61.[10]

ROSZEL C. THOMSEN
Chief Judge, U.S. District Court

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[10] The Court adheres to the general principles stated on the last page of Judge Chesnut's opinion in *Hansen* v. *Bradley*, as reported in 114 F. Supp. at 387.

APPENDIX C

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 12,901.

ADVANCE BUSINESS SYSTEMS AND SUPPLY COMPANY,

Appellee,

versus

SCM CORPORATION,

Appellant.

No. 12,902.

ADVANCE BUSINESS SYSTEMS AND SUPPLY COMPANY,

Appellant,

versus

SCM CORPORATION,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, District Judge.

(Argued May 8, 1969 Decided August 18, 1969)

APPENDIX C

☜ (See opposite)



Before SOBELOFF, BRYAN and BUTZNER, Circuit Judges.

Robert G. Levy and Robert S. Paye (Berryl A. Speert and Frank, Bernstein, Conaway & Goldman on brief) for Advance Business Systems & Supply Company, and William E. Willis (Arthur W. Machen, Jr., J. Marshall Wellborn and Alan D. Yarbro; Venable, Baetjer & Howard and Sullivan & Cromwell on brief) for SCM Corporation.

SOBELOFF, Circuit Judge:

This private antitrust action involves alleged violations by the defendant, SCM Corporation, of sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act. After a non-jury trial, the District Court granted the plaintiff, Advance Business Systems & Supply Company, both treble damages of $50,142 and injunctive relief based on certain of the claimed antitrust violations. SCM appeals from the judgment of liability and in addition challenges as excessive the award of attorneys' fees of $35,875. Advance cross-appeals, contending that the District Court erred in failing to find additional antitrust violations and in failing to award damages claimed by the plaintiff in respect to them. Because both parties are appealing from the judgment of the District Court, they will, for clarity, be referred to in the opinion as plaintiff and defendant.

Defendant SCM is a New York corporation which manufactures and sells, among other products, office copying machines and the paper and other supplies used in the machines. Advance, the plaintiff, is a Maryland corporation formed in 1964 to distribute paper and supplies for copy machines, primarily in the Baltimore area. It is a franchised dealer for Nashua Corporation, a manufacturer and

distributor of such paper and supplies on a nationwide basis.

As the findings of the District Court indicate, the office copying machine market is actively competitive, with customers changing readily from one copier to another. Manufacturers and distributors supply many different models of copy machines using a variety of copying processes. Xerox Corporation, the industry leader, markets the only machines using the "indirect electrostatic process";[1] in 1967 it controlled approximately 60% of the office copying market in the United States. SCM, utilizing the direct electrostatic process in its copiers, has about 3% of the market, measured either by the number of machines sold or rented or by the total number of copies made annually on the several brands of machines.

Since the sale of supplies, particularly paper, is often more profitable than the sale or rental of the machines themselves, competition is especially sharp in this branch of the copying industry. SCM copiers, employing the direct electrostatic process, will make copies only on special coated paper, sold by SCM and other manufacturers and distributors, including the plaintiff. In 1967, SCM sold about 13% of all copies made on direct electrostatic ma-

[1] In the electrostatic process, the surface of the original (the document or other object to be copied) is exposed to light and reflected onto an electrically charged surface. Xerox copy machines, using the "indirect" process, reflect the light from the original onto an electrically charged drum, where the image is formed by brushing with a powder toner. This image is then transferred to copy paper, which may be ordinary bond paper.

All other electrostatic copiers use the "direct" copying process, in which light is reflected from the original onto a special coated copy paper which has been electrically charged. The visible image is formed on the coated paper by a liquid "toner," and the copy is dried in the machines. This process requires the use of special copy paper.

chines; a number of other manufacturers of direct electrostatic copying equipment, including Dennison and Bruning, had larger shares of the market. SCM's share of the market has been shrinking since 1964, when it sold approximately 37% of all direct electrostatic copies.

SCM and other manufacturers make copy machines available on three alternative bases: purchase, rental, or lease from an independent leasing company. Customers who rent machines generally pay on a "machine click" or "copy service" basis, the rental varying with the number of copies actually made on the particular machine. Copying supplies for use with the machines are sold both by machine manufacturers and by paper manufacturers which, like Nashua Corporation, produce coated paper designed for use in the various machines.

SCM sells most of the supplies used with SCM copiers, but since 1965 it has faced increasing competition in this area, particularly from Nashua Corporation and its dealers, including the plaintiff. The District Court found that approximately 90% of the competition SCM encountered in the sale of electrostatic paper in Maryland was from Nashua.

In the present litigation, Advance challenges a number of SCM's practices in the copy supply market as forbidden under the antitrust laws. The complaint alleged that SCM by various actions unreasonably restrained trade; that it attempted to monopolize and conspired to monopolize trade in the manufacture and sale of electrostatic copying supplies; and that it impermissibly tied sales of its electrostatic copying paper to its machines, other supplies, service contracts, and warranties. The District Court found that SCM had violated the antitrust laws in three respects, all involving tying arrangements made illegal either by sec-

tion 3 of the Clayton Act or by section 1 of the Sherman Act. SCM contests that judgment here.

I. *Tying Arrangements*

Tying arrangements may be defined as agreements under which the vendor will sell one product only if the purchaser agrees to buy another product as well. As a result, competition is curbed in two ways. First, the buyer is prevented from seeking alternative sources of supply for the tied product; second, competing suppliers of the tied product are foreclosed from that part of the market which is subject to the tying arrangement. Whenever a tie-in is successful, competition is inevitably curtailed; moreover, tie-ins can rarely be justified for they "serve hardly any purpose beyond the suppression of competition." *Standard Oil Company* v. *United States,* 337 U.S. 293, 505-06 (1949).

For these reasons, tie-ins have been held illegal under both section 3 of the Clayton Act[2] and section 1 of the Sherman Act. *Northern Pacific Ry.* v. *United States,* 356 U.S. 1 (1958) (§1); *International Salt Co.* v. *United States,*

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[2] Section 3 of the Clayton Act, 15 U.S.C. § 14, provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Although the literal terms of section 3 refer to exclusive dealing contracts, it has been interpreted as applying to tying conditions, which "operate in the manner forbidden by the statute." International Business Machines v. United States, 298 U.S. 131, 135 (1936).

332 U.S. 392 (1947) (§§1 and 3); *International Business Machines Corp.* v. *United States,* 298 U.S. 131 (1936) (§3). The standards of illegality under the two statutes are not identical, however, and therefore the tying practices of SCM found illegal by the District Court must be examined separately in light of the particular statute applicable to each specific arrangement.

Two of the three challenged practices to be discussed involve tie-ins between rented SCM machines and SCM supplies and are therefore covered by the Clayton Act, which applies only to tie-ins involving "goods, wares, merchandise, machinery, supplies, or other commodities." 15 U.S.C. § 14. In the third arrangement, however, the sale of SCM paper is tied to SCM service contracts, which do not come within the terms of the Clayton Act. To establish liability, the latter practice must, therefore, be shown to be "unreasonable" under section 1 of the Sherman Act.[3]

A. *The Clayton Act*

In section 3 of the Clayton Act, Congress singled out tying arrangements and "authoritatively determined that these practices are detrimental where their effect may be to lessen competition." *Standard Oil Co.* v. *United States,* 337 U.S. 293 at 311. If a transaction may be characterized as a tie-in between items covered by the Clayton Act, therefore, it is automatically illegal under section 3 whenever "a substantial volume of commerce in the 'tied' product

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[3] Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," but the statute has been construed as proscribing only those restraints on trade which are "undue" or "unreasonable." Standard Oil of New Jersey v. United States, 221 U.S. 1 (1911).

is restrained." *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 608 (1953).

1. *The Model 55*

The first antitrust violation found by the District Court in the present case involved SCM's practice of marketing its Model 55 copier solely on a "copy service" basis. Under this plan, the customer pays a single charge based on the number of copies run on the machine as recorded by a meter, and supplies and service are included in the single charge. Since the plan forecloses all competition for supplies to be used with Model 55, the District Court concluded that it was illegal "unless and until Model 55 is also offered for rental on a reasonable basis without the requirement that SCM paper be purchased."

On appeal, SCM urges that this conclusion is erroneous in four respects. First, it contends that the "copy service" plan is not illegal because each of its components—machine and paper—is separately available, and "where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." *Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 6 n.4 (1958).

Although Model 55 was originally distributed only on a copy service basis, the District Court found that since March 1, 1967, the machine has also been offered separately for sale and lease.[4] Purchase of a copying machine for $4250, however, is clearly not the economic equivalent of rental at a charge of approximately $.035 per copy. The

[4] With respect to the Model 55 tying arrangement, the District Court considered only antitrust violations occurring after March 1, 1967, since "plaintiff has not proved any damage to it with respect to any Model 55 prior to March 1967."

lease arrangement which SCM suggests as a theoretical alternative to rental (there is no indication in the record that a Model 55 has in fact ever been leased) envisages an intermediate sale of the machine by SCM to an independent leasing company, which in turn leases the machine to the customer. The record is devoid of evidence that such a leasing arrangement represents a reasonable alternative to direct rental by SCM to the user of Model 55, in respect to price, machine maintenance and service, or practical availability. Consequently, Model 55 and SCM supplies cannot realistically be regarded as separately available to SCM's customers. Tie-ins are non-coercive, and therefore legal, only if the components are separately available to the customer on a basis as favorable as the tie-in arrangement.

In its next argument, SCM asserts that the copy service tie-in is not illegal because the District Court did not find that SCM had any economic power over the tying product, the Model 55 copier. In so arguing, however, SCM ignores the distinction between standards of illegality under the Clayton Act and those established by the Sherman Act. In *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 608-09 (1953), the Supreme Court clearly pointed out the difference:

> When the seller enjoys a monopolistic position in the market for the "tying" product, *or* if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is "unreasonable, *per se,* to foreclose competitors

> from any substantial market," a tying arrangement is banned by § 1 of the Sherman Act when *both* conditions are met. (Emphasis in the original.)

Congress singled out tie-ins for special treatment in the Clayton Act upon the generally accepted view that they rarely have any function other than suppression of competition. For the same reason, a seller's successful imposition of a tying arrangement on a substantial amount of commerce may be taken as proof of his economic power over the tying product. See *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969); *Northern Pacific Ry.* v. *United States*, 356 U.S. 1 (1958). The Clayton Act therefore requires no separate showing of economic dominance where a tying arrangement affects sufficient commerce.

SCM further argues, however, that Advance has not shown that substantial commerce in the tied product—copying supplies—is restrained by the arrangement. At trial, Advance showed only that in the course of selling its own supplies in the Baltimore area, it "discovered" the Model 55 in eight locations, and SCM contends that this cannot support the District Court's finding that "a not insubstantial amount of interstate commerce in the tied product is affected" by the copy service plan.

SCM misconstrues the District Court's finding, which is not limited to foreclosure of that portion of the market in which the plaintiff and defendant are actual competitors. As the Supreme Court recently said in *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 502 (April 7, 1969):

> Congress has encouraged private antitrust litigation not merely to compensate those who have been directly

> injured but also to vindicate the important public interest in free competition. [citation omitted] For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, therefore, *the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit.* (Emphasis added.)[5]

In the present case, the District Court found that in 1966 SCM sold approximately 200 million sheets of paper to be used with Model 55's under copy service. At a copy service charge of approximately $.035 a copy, the aggregate revenue from this source was $7,000,000. Clearly this represents a substantial volume of commerce. See *Fortner Enterprises, Inc.* v. *United States Steel Corp., supra* (almost $200,000 not insubstantial); *International Salt Co.* v. *United States,* 332 U.S. 392 (1947) ($500,000).

SCM's final contention with respect to the copy service plan is that Advance did not demonstrate that it was harmed or threatened with harm by the copy service plan. Such a showing is a prerequisite to a private antitrust action seeking treble damages under section 4 of the Clayton Act or injunctive relief under section 16.[6] The District

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[5] A still more recent expression of the Court's keen concern with the public interest attaching to private antitrust litigation is Utah Public Service Comm'n v. El Paso Natural Gas Co., et al., 37 U.S. L.W. 4575 (June 19, 1969).

[6] Section 4 of the Clayton Act, 15 U.S.C. § 15, provides

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court * * *

(*continued on next page*)

Court, however, found that Advance suffered $16,714 in single damages as a result of SCM's restrictive practices, and there is ample support in the record for this finding.

Although the court did not segregate the damages or assign particular dollar losses to each of SCM's different restrictive practices, it did specifically find a "probable loss of some sales of paper for use with the few Model 55 machines proved to have been in copy service in Baltimore." The court further concluded that "SCM's copy service plan denied plaintiff the opportunity to compete for this business." The plaintiff's burden of proving the fact of damages under section 4 of the Clayton Act is satisfied by the showing of *some* damage arising from a given antitrust violation; further proof is relevant only to the amount, and not the fact of damage. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 37 U.S.L.W. 4424 (U.S. Supreme Court, May 19, 1969). Since the plaintiff's total exclusion from the Model 55 supply market constitutes "threatened" as well as past damage, the court's grant of injunctive relief was justified under section 16 of the Act.

2. *Other Rental Agreements*

The District Court also found that SCM illegally imposed tying arrangements on direct lessees of its other copier models, Models 33, 44, 66, and 88, by threatening to cancel the rental agreements and falsely representing that competitive supplies used by the lessees were damaging the rented machines.

Section 16 of the Act, 15 U.S.C. § 26, provides

> Any person, firm or corporation, or association shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the antitrust laws * * *

SCM's rental agreements for copiers other than Model 55 include a provision that "supplies which may cause damage or deterioration will not be used in the machines." We agree with the District Court's conclusion that such a clause is itself not unreasonable, since it is designed to avoid damage to the lessor's property. *International Salt Co.* v. *United States,* 332 U.S. 392, 397 (1947). An illegal tying arrangement may be shown to exist, however, even where it is not imposed by means of an express contractual provision. The presence of the illegal condition may be inferred from an extrinsic course of conduct supplementing the written contract. *Osborn* v. *Sinclair Refining Co.,* 286 F.2d 832 (4th Cir. 1960); *McElhenney* v. *Western Auto Supply Co.,* 269 F.2d 332 (4th Cir. 1959).

In the present case, the District Court found that through persistent and deliberate misrepresentations, sabotage, and threats of cancellation, SCM effectively used the "damage or deterioration" clause in the rental agreement to coerce lessees to use only SCM supplies in their rental machines.

Although, as the court specifically found, Nashua paper is no more likely than SCM paper to damage SCM machines, SCM representatives informed customers that

> the use of Nashua supplies would cause service calls and interrupt the continuous operation of their SCM machines * * * [and they did so] for the purpose of inducing them to cease dealing or to refrain from dealing with the plaintiff.

Specific instances of misconduct by SCM representatives were shown at trial and accepted by the trial judge as part of a consistent course of conduct by SCM:

> It was the policy of defendant from at least as early as August of 1965 and continuing through until the

> date of trial to threaten the cancellation of rental agreements with customers who used competitive supplies in their SCM machines. This policy was communicated to SCM machine lessees, who were customers and prospective customers of competitive suppliers, including the plaintiff.

The District Court concluded that the plaintiff had been damaged by the illegal tying arrangement imposed as a result of SCM's actions.

SCM maintains that an illegal tie-in contract cannot properly be inferred from its conduct with respect to the rental agreements. Reiterating arguments raised in the copy service context, SCM asserts that it had no economic power over the tying product, the rented machines, and that in any event there could be no tie-in where the machines and supplies could be *purchased* separately. As we have explained in the earlier context, purchase is not the economic equivalent of rental, and no showing of economic power is required to establish a violation of the Clayton Act.[7]

SCM also insists that the court could not determine that an illegal tying arrangement had been imposed by SCM in light of its own finding that no rental agreements in Maryland were actually terminated by SCM because of a customer's use of competitive supplies. The fact that an agreement is leniently administered, however, does not necessarily lessen, and certainly does not eliminate, its restrictive effect on competition. The overhanging threat of enforcement is ever present, and implied agreements,

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[7] With regard to both the rental agreements and the service maintenance contracts, the District Court's finding that a substantial amount of commerce is affected is not questioned by the defendant and is amply supported by the record.

like express contracts, may be "held over the heads of vendees [and] deny defendant's competitors access to the fenced-off market on the same terms as the defendant." *Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 12 (1958); *International Salt Co.* v. *United States,* 332 U.S. 392, 398 (1947).

B. *The Sherman Act.*

The third antitrust violation found by the District Court pertains to an arrangement by which SCM tied its service contracts to the sale of SCM paper and supplies. Section 3 of the Clayton Act is not applicable when either the tying or tied product is a service, and the court's conclusion that the tie-in was illegal was based on section 1 of the Sherman Act.

SCM provides service for SCM machines in several ways. For customers not already receiving free service contracted for under rental and copy service programs, or under the terms of sale guarantees, service is available on either a time and material basis or under a service maintenance contract. Under the service maintenance contract, SCM agrees to furnish unlimited service for the contract's duration, to replace most defective parts without charge, and to make regular inspections, all for a single annual fee.

Service is extended on a time and material basis whether or not a customer is using SCM supplies with his SCM machine. Similarly, before April 15, 1963, the flat fee service contract contained no restrictions relating to the use of competitive supplies. Since then the contract has been amended and at present contains the following two clauses:

> Because SCM photocopy machines are designed to give excellent performance with SCM photocopy supplies, including Microstatic Dispersant, Replenisher, and Electrostatic Copy Paper, SCM reserves the right to suspend this agreement as to any machines in which other suppliers' paper or other supplies have been used.
>
> This agreement shall not apply to any repairs made necessary by the use in SCM photocopy machines of dispersant, replenisher, electrostatic copy paper or other photocopy supplies made by other than SCM and not approved by SCM for use in SCM equipment.

Notably, SCM has never approved any competitive paper for use in SCM machines, although, as the District Court found, SCM officials know that Nashua paper is "safe and as effective as SCM paper for such use." In effect, therefore, the service contract is tied to the sale of SCM supplies.

Under the Sherman Act, tying arrangements are *per se* illegal

> whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product *and* a "not insubstantial" amount of interstate commerce is affected. (Emphasis added.) *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 499 (1969).

In the present case, the District Court concluded that the "competitive supplies" clauses in the service contract gave rise to a *per se* violation of the Sherman Act, and we are in agreement with that judgment.

In one respect, however, we find the court's reasoning inconsistent with both the law and its own general conclusion as to the illegality of SCM's conduct in connection with the service contracts. In analyzing SCM's practices, the District Court correctly decided that a violation of section 1 of the Sherman Act occurred when SCM employees utilized the competitive supplies provisions in the service contract to coerce customers to use only SCM supplies. Our only disagreement with the court arises from its conclusion that the restrictive provisions of the service contract were not invalid on their face. The court reasoned as follows:

> The antitrust laws do not require SCM to furnish service at a flat rate under its service agreement when other than SCM supplies are used, provided SCM is willing to furnish service in such cases at a fair rate on a time and material basis. But the antitrust laws do not allow SCM to misrepresent the effect of the agreement or the reasons for malfunctioning of the machines as part of a plan to force customers to abandon the use of competing supplies which do not damage the machine.

In antitrust terms, the judgment that the restrictive clauses are themselves reasonable is not warranted by the contract language prohibiting use of competitive supplies. The court specifically concluded that

> SCM was legally entitled to cancel the flat rate service agreement unless SCM supplies were used, provided SCM was willing, as it was, to offer service at a reasonable price on a time and material basis.

The misrepresentations, sabotage, and threats of cancellation by SCM employees, which the court describes, were intended to disparage competitive supplies and thereby induce customers to use only SCM supplies. As antitrust law provides and as the court properly concluded, the imposition of such a condition is illegal. However, the tying arrangement is no less invalid when it is written into a formal contract than when it is imposed by means of coercive or fraudulent practices. The court's reasoning relative to SCM's informal practices is equally applicable to the contract clauses themselves. We have here both illegally restrictive contract language and conduct designed to enforce the illegal restrictions—all in violation of the Sherman Act.

In its cross-appeal, Advance presents arguments for finding the cancellation and repairs clauses unreasonable as written. The plaintiff asserts that the clauses, which clearly tie the service contract to the sale of SCM supplies, were not motivated by legitimate reasons, such as the difficulty of servicing machines which use unfamiliar supplies, but were adopted and imposed on the customer solely for anti-competitive purposes. Therefore, asserts Advance, the clauses themselves are illegal, for the accepted principle is that tying arrangements "serve hardly any purpose beyond the suppression of competition," and that

> such nonanticompetitive purposes as these arrangements have been asserted to possess can be adequately accomplished by other means much less inimical to competition. *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5-6 n.5 (1958).

Where, as here, the seller establishes no business reason for imposing the tying arrangement, Advance argues that the court must find it illegal.

Advance is correct in claiming that SCM has failed to establish a legitimate reason for the tying clauses. The District Court found significance in the fact that they were added to the contract at the insistence of the sales department rather than the service department. Accordingly, it concluded that

> the competitive supplies clauses, authorized by SCM's national sales department, were designed to be used as a lever to coerce customers to use only SCM supplies. The service agreement was actively and intentionally used for that purpose by field personnel.

Use of tying arrangements as an anticompetitive device is the very behavior which the antitrust law of tie-ins is designed to prevent. *Northern Pacific Ry. v. United States*, 356 U.S. 1, 8 (1958). Therefore, the District Court's reasoning that the service contract arrangement is *per se* illegal under the Sherman Act applies to the contract clauses themselves as well as to the coercive conduct of SCM employees.

SCM asserts, however, that the flat fee service arrangement cannot give rise to a *per se* violation of the Sherman Act because there is no showing that SCM has "sufficient economic power with respect to the tying product," a necessary element of *per se* illegality. It thus challenges the District Court's finding that SCM had "sufficient economic power to permit it to use its * * * agreements * * * as tying products or vehicles to coerce the sale of paper."

Although it is impossible to state with precision a general rule as to what constitutes "sufficient economic power over the tying product" to render a tie-in illegal, it is clear that no actual economic dominance need be shown:

> Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes. *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962).

Some courts and commentators have assumed that at present there is no real distinction between the standards of the Clayton Act and the Sherman Act, and that if a tying arrangement is successfully imposed on a "not insubstantial" amount of commerce, a violation of both statutes results.[8]

In its most recent pronouncement on tying arrangements under the Sherman Act, the Supreme Court comes close to adopting this position.[9] In *Fortner Enterprises, Inc.* v.

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[8] See Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 521 (1969) (Fortas, J., dissenting):

> But *Northern Pacific*, in effect, applied the same standards to tying arrangements under the Sherman Act as under the Clayton Act, on the theory that the anticompetitive effect of a tie-in was such as to make the difference in language in the two statutes immaterial.

And see Northern Pacific Ry. v. United States, 356 U.S. 1, 7-8 (1958); Lessig v. Tidewater Oil Co., 327 F.2d 459, 470 (9th Cir. 1964); American Bar Ass'n, Antitrust Developments 1955-68 at 107 (1968); M. Handler, Recent Antitrust Developments, 13 The Record 417, 420 (1958) (The Association of the Bar of the City of New York); D. Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 64 (1958); Note, 74 Yale L.J. 691, 693 (1965).

[9] Justice White's dissent explicitly declares what is implicit in the majority opinion when he challenges the Court's holding that

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United States Steel Corp., 394 U.S. 495, 503-04 (1969), the Court states:

> These decisions rejecting the need for proof of truly dominant power over the tying product have all been based on a recognition that because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraints result whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market. • • • *Accordingly, the proper focus of concern is whether the seller has the power to raise price, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.* (Emphasis added.)

In analyzing the facts of *Fortner* itself, however, the Court went beyond a simple inquiry into the success or failure of the tying arrangement to assess the "special economic power" of the defendant and the "uniqueness" of the tying product.

The Court's approach in *Fortner* indicates that there are situations in which the mere showing of a tie-in's success may be an inadequate basis from which to infer the seller's control over the tying product. In *Fortner* itself, the plaintiff in the antitrust suit was the only buyer subject to the

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"buyers' acceptance of the tie-in—the simple fact that there are customers—will always suffice to prove market power in the tying product." 394 U.S. at 518.

challenged tying arrangement. The lower court reasoned that, in the circumstances, the plaintiff's acquiescence in the arrangement was not sufficient to prove the defendant's "economic control with respect to buyers generally." 394 U.S. at 499. Since the plaintiff had not shown the defendant's power over the tying product in any other way, the trial court there concluded that there was no illegal tie-in.

Although the Supreme Court reversed the lower court, it recognized the validity of its reasoning that no inference could be drawn from a single buyer's acceptance of the tie-in. The Court therefore rested its finding that the seller had sufficient power over the tying product on a factual assessment of the product's "uniqueness" and "desirability" rather than on mere success in imposing the tie-in.[10]

Moreover, *Fortner* suggests that even where an "appreciable number of buyers" are involved, the effectiveness of a tie-in may not always show the seller's economic power because it is possible that some tie-ins serve "legitimate business purposes." 394 U.S. at 506. Although adjudicated tie-in cases and scattered dicta suggest that there are only a few such legitimate purposes,[11] their

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[10] In the *Fortner* case, prefabricated houses supplied by United States Steel Corporation were tied to loans made by its wholly owned subsidiary, the U. S. Steel Homes Credit Corporation. Discussing the seller's power over credit, the tying product, the Court noted that the houses cost the buyer more than the going market rate, a disadvantage suggesting some special economic power in the seller. The Court also referred to the seller's unique financing offer, amounting to 100% of the purchase price of the land to be acquired, offered at low interest. To the Court, these facts suggested the seller's "unique economic advantages over his competitors." 394 U.S. at 505.

[11] Tying arrangements may be legitimate in order to preserve good will when the seller's tying product works satisfactorily only in conjunction with another product made by the seller, or to

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existence precludes reliance on a flat rule which would make all successful tie-in illegal.

Under *Fortner,* therefore, unless the defendant can show legitimate business reasons for a tie-in,[12] the "sufficient economic power" test of *per se* illegality is satisfied when it appears that the seller has the power to "impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." 394 U.S. at 504. This is not a new standard, for the Court has previously recognized that extensive imposition of a tie-in may sufficiently indicate a seller's economic control over the tying product, at least when "no other explanation has been offered for the existence of these restraints." *Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 8 (1958).

In the case before us, the District Court found that the tying arrangement was imposed to increase sales rather than to serve a legitimate purpose such as the preservation of good will or the protection of a new industry. The District Court's well-supported, extensive and clearcut findings of sabotage, misrepresentation, and threats of cancellation underline the fact that the clauses

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protect a new business. Good will: Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir. 1961), *cert. denied,* 368 U.S. 931 (1961); Standard Oil Co. v. United States, 337 U.S. 293, 306 (1949). New business: United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961); White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

[12] Once the existence of a successful tie-in is shown, the defendant has the burden of showing a legitimate business reason for imposing the condition. United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 548 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961); Comment, 62 Mich. L. Rev. 1413, 1422 (1964); see Northern Pacific Ry. v. United States, 356 U.S. 1, 8 (1958).

in the service contract were an integral part of a pattern of anticompetitive behavior.

The District Court's findings that SCM imposed the service contract tying arrangement in order to coerce customers to use only SCM supplies effectively rule out the possibility of any "legitimate business purpose" for the tie-in. The Supreme Court's conclusion in the *Northern Pacific* case is therefore applicable here:

> So far as the [defendant] was concerned its purpose obviously was to fence out competitors, to stifle competition. While this may have been exceedingly beneficial to its business, it is the very type of thing the Sherman Act condemns. In short, we are convinced that the essential prerequisites for treating the defendant's tying arrangements as unreasonable *"per se"* were conclusively established below and that the defendant has offered to prove nothing there or here which would alter this conclusion. 356 U.S. at 8.

SCM's service agreement, as written, explicitly prescribes a tying condition. No acceptable business purpose underlies this condition, but, as the District Court found, it was incorporated in the contract only to suppress competition in copying supplies. Acquiescence in the burdensome term by an appreciable number of customers gives rise to an inference that SCM had "some power over some buyers" in the market.[13] Consequently, the tying arrangement is *per se* illegal under section 1 of the Sherman Act.

---

[13] The District Court found that approximately 25% of SCM machine owners and lessees in the Baltimore area had entered into service maintenance contracts imposing the tying condition.

II. *Other Antitrust Violations*

In its cross-appeal, Advance complains of error in the District Court's failure to find further antitrust violations arising from SCM's behavior in the office copy supply market. The court concluded that neither the *sale* of SCM machines nor the guaranty accompanying such sales had been conditioned on the purchase of SCM supplies, and the record fully supports this conclusion. The court did find that during 1964 the sale of paper had been tied to the sale of toner used in the copying machines. However, the two items are at present sold separately at reasonable prices, and the court held that regardless of any damage that may have been suffered by others, the plaintiff showed no damage from the earlier tie-in. We find no error in this regard.

Advance also alleged in its complaint that SCM attempted to monopolize and conspired to monopolize interstate commerce in the sale of paper for its copying machines, in violation of section 2 of the Sherman Act. The court concluded that SCM had not attempted to monopolize the relevant submarket—sale of coated paper for all "direct" electrostatic copiers; SCM sells paper only for use in SCM machines. The court properly held that paper for use in SCM machines is not a relevant market or submarket, since all "direct" electrostatic copiers are reasonably interchangeable. *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *DuPont & Co.*, 351 U.S. 377 (1956). We agree with these conclusions in all respects.

III. *Damages*

The District Court assessed the plaintiff's damages arising from SCM's illegal tying arrangements at $16,714.

Under the statute, 15 U.S.C. § 15, the damages were trebled. The damages were primarily based on costs incurred by Advance in mitigating the effect of SCM's restrictive practices, and were described by the court as follows:

> All factors considered, the Court has concluded that the fair measure of damages to plaintiff in this case is the reasonable cost of furnishing service to those customers of plaintiff who purchased paper and other supplies for use in SCM machines, plus the value to plaintiff of Elkins' [President of Advance] time spent in offsetting defendant's restrictive practices. The sum of those two items fairly covers plaintiff's actual damages, including the small loss of specific sales which plaintiff proved and the probable loss of some sales of paper for use with the few Model 55 machines proved to have been on copy service in Baltimore.

The record satisfies us that the court's findings with respect to the damages actually awarded are not clearly erroneous. However, regarding one item of damages not awarded by the court, the loss of Commercial Credit business, its basic factual findings and our decision today concerning the service contract tie-in compel a modification of the damage award.

At trial, the plaintiff showed and the court affirmatively found that "the plaintiff was wrongfully deprived of the sales actually made by SCM to Commercial Credit." These sales of paper and supplies were lost because SCM threatened to cancel Commercial Credit's service contract if it continued to use Nashua supplies sold by Advance. The court, concluding that by the terms of the contract "SCM was legally entitled to cancel the flat rate service

agreement unless SCM supplies were used" and therefore that the threat to cancel was not an antitrust violation, awarded no damages for the lost sales. Our decision, as set forth above, that it was error not to hold the cancellation clause itself illegal as a tie-in will require the award of additional damages for the lost Commercial Credit sales.

IV. *Attorneys' Fees*

Finally, both parties object to the amount of the attorneys' fees awarded by the court. The plaintiff requested fees of $60,000, and the court awarded $35,875, subtracting that portion of the fees attributable to time spent in developing issues and items on which the plaintiff failed to prevail. The plaintiff complains that the award is inadequate.

Defendant SCM, on the other hand, contends that the District Court abused its discretion by setting a fee in excess of the single damages award. Relying on a number of cases, SCM contends that attorneys' fees should not exceed a reasonable percentage of the single damage award. See *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir. 1952); *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951).

In the cases cited, however, the damage awards were large, and a percentage limitation did not preclude substantial and compensatory attorneys' fees. When the damages recovered are relatively small, as in the present case, it is not necessarily an abuse of discretion to grant fees exceeding the amount of single damages. *Courtesy Chevrolet, Inc.* v. *Tennessee Walking Horse Breeders*, 393 F.2d 75 (9th Cir. 1968); *Volasco Products* v. *Fry Roofing Co.*, 346 F.2d 661 (6th Cir. 1965).

The plaintiff insists that the District Court underestimated the amount of work attributable to its successful claims, while the defendant asserts that very little legal time or effort was required in respect to the issues on which the plaintiff prevailed. It appears that in fixing the fees, the District Court considered a number of factors: the magnitude and complexity of the litigation, the time and labor spent, the standing of counsel at the bar, and other relevant considerations set out in its supplementary opinion.

The District Court is in the best position to evaluate the amount and quality of the work actually performed by plaintiff's attorneys and to determine what proportion of their time and labor was expended on issues with respect to which the plaintiff was ultimately awarded damages. In the circumstances, we cannot conclude that the District Court abused its discretion in awarding fees of $35,875; but as the case must be remanded for modification of the judgment for the plaintiff to include the Commercial Credit item, the District Court will have an opportunity to augment the counsel fees if in its opinion the fees awarded were unduly diminished by reason of the plaintiff's failure to prevail in that court as to the Commercial Credit claim.

Affirmed and Remanded for Modification of the Award of Damages.

APPENDIX D

APPENDIX D

Order of Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 12,901.

ADVANCE BUSINESS SYSTEMS AND SUPPLY COMPANY,

Appellee,

versus

SCM CORPORATION,

Appellant,

No. 12,902.

ADVANCE BUSINESS SYSTEMS AND SUPPLY COMPANY,

Appellee.

versus

SCM CORPORATION,

Appellant.

ORDER

The court, upon consideration of the petition of appellant in No. 12,901 and appellee in No. 12,902 for a rehear-

ing in each case, adheres to its disposition of the case and hereby denies a rehearing.

(Signature Illegible)
United States Circuit Judge

(Signature Illegible)
United States Circuit Judge

(Signature Illegible)
United States Circuit Judge

Filed
Oct. 6, 1969
SAMUEL W. PHILLIPS
Clerk

A True Copy, Teste:

Samuel W. Phillips,
Clerk

By MARGARET P. JOHNSON
Deputy Clerk

APPENDIX E

APPENDIX E

Statutes Involved

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §1, reads in relevant part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 3 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §14, provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §15, states:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

APPENDIX F

APPENDIX F

SCM Copy Service Agreement

CONTRACT NUMBER F 47758

[Emblem]

SCM CORPORATION NEW YORK, N. Y. 10022

410 PARK AVENUE

COPY SERVICE AGREEMENT
CORONASTAT 55 ELECTROSTATIC OFFICE
COPY MACHINES

We hereby order SCM Coronastat 55 copy service and for this purpose for placement at the premises listed below, ... Coronastat 55('s)

We agree to pay the monthly copy service charge as set out below for such machine(s), which SCM may invoice monthly on the day of the month the machine(s) is (are) installed. We agree also that a minimum charge equal to the copy service charge on 2,000 copies per machine may be made for each month or portion of a month that the machine(s) was (were) placed with us. Further we agree to pay $25.00 covering all transportation and delivery charges, with the understanding that $25.00 will be credited to our account at the end of the sixth consecutive month of copy service.

The monthly copy service charge for each CORONASTAT 55 Copier placed with us is:

MONTHLY COPY VOLUME

First 2000 copies	— .065¢	per copy.
Next 3000 copies	— .035¢	" "
Next 2000 copies	— .030¢	" "
Next 5000 copies	— .025¢	" "
All additional copies	— .020¢	" "

We understand that the specified monthly copy service charge includes SCM Coronastat Copy Paper, Coronastat Disperant and Replenisher and maintenance service required to perform satisfactory copy service.

We do agree, however, that any service work made necessary by our willful act or negligence, or any service work we specifically request to be performed outside regular business hours may be invoiced in accordance with SCM established service policy.

We understand that the machine(s) and supplies remain the property of SCM, placed with us to provide us with copy service and agree not to make any alterations in the machine(s), not to remove the machine(s) from the below stated address(es) and not to dispose of the supplies, without receiving prior written approval of SCM.

We also understand that all unused supplies remain the property of SCM and agree to account to SCM for such supplies from time to time and on any termination of this agreement, with SCM bearing all risk of loss or damage to such supplies unless due to our willful act or negligence. Similarly, all risk of loss or damage to the machine(s) while installed on our premises shall be borne by SCM unless due to our willful act or negligence.

This copy service agreement may be cancelled by us at any time upon one month's notice in writing to SCM Cor-

poration, 410 Park Avenue, New York City, N. Y.; and it may be cancelled by SCM at any time upon one month's notice in writing and, at the option of SCM, may be cancelled without prior notice where invoices are unpaid and overdue.

(The copy service charge includes all regular paper and supplies and service. There is no other basis for price.)

Install ——— Coronastat 55(s) at:

Name _____

Address _____

street city state

Name _____

Address _____

street city state

(Use reverse side of this agreement if additional locations are being specified.)

Customer
Order No. Date

Movement
Report Nos. Date

ORDERED BY:

company name

mailing address zip code

city state

authorized signature and title

agreement date

SALESMAN

name no. location no.

Salesman's Signature

name no. location no.

Sales Manager Approval

SCM 855–3

ACTION COPY

APPENDIX G

APPENDIX G

SCM Rental Ownership Agreement

[Emblem]

SCM CORPORATION

RENTAL OWNERSHIP AGREEMENT

Electrostatic Office Copiers

SCM Corporation ("SCM") agrees to rent the Electrostatic Office Copiers listed below to of ("User") for the period and subject to the terms and conditions set forth on the face and reverse of this Agreement.

1. User agrees to pay SCM the rental indicated for each machine quarterly in advance with the first quarter's rental (includes shipment, installation, service and operator instruction) payable on the execution of this Rental Ownership Agreement.

2. The Electrostatic Office Copiers covered by this Rental Ownership Agreement are as follows:

MODEL & NUMBER	LOCATION	INITIAL QUARTERLY RENTAL
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	
.....	.....	

STATE TAX .....
LOCAL TAX .....
TOTAL .....

3. If, during the terms of this Agreement, User should desire to purchase these machines, User shall be entitled to a credit equal to 95% of three month's rental during the first month, 85% during the second month and 75% during and after the third month, and shall be entitled to a new machine warranty.

4. Should User decide to change from one model to another when exercising his purchase option, fifty dollars will be deducted from the Initial Quarterly Rental before application of the appropriate rental credits, mentioned above, and User shall also be entitled to a new machine warranty.

5. Subsequent Quarterly Rental:

Model .... Per Month
Model .... Per Month
Model .... Per Month

.....
SCM Sales Office

.....
SCM Authorized Signature

Optional Purchase Price .....
Date .....
Firm .....
By .....
Title .....

BILL TO:

Name .....
Company .....
Address .....
City & State .....

SHIP TO:

Name .....
Company .....
Address .....
City & State .....

6. User agrees to pay or reimburse SCM for payment of any taxes, federal or state or local, to which this Agreement or the machines leased hereunder may become subject.

7. SCM will make, during regular service hours, all necessary repairs without charge, except that, repairs due to misuse, accident, or Acts of God shall be at Users expense. SCM warrants that the machines, when used in accordance with instructions, will be useful in making copies on electrostatic paper, but SCM makes no other warranty expressed or implied. SCM shall not be liable for delays in performing service occasioned by Acts of God, fires, labor or transportation difficulties or any other causes beyond its control.

8. User understands that all machines remain the property of SCM and User agrees that (a) the machines will not be altered or serviced by anyone other than an authorized SCM repairman, (b) supplies which may cause damage or deterioration will not be used in the machines, and (c) the machines will not be moved from place of initial installation without receiving prior written approval from SCM.

9. All risks of loss of or damage to the machines while installed on User's premises shall be borne by SCM except loss or damage due to User's willful act or negligence.

10. This Rental Ownership Agreement is for the term of three months, and shall continue from month to month thereafter, to be paid quarterly in advance. During the initial three-month period, the Agreement may be terminated by SCM on 15 days prior written notice; thereafter, the Agreement may be terminated by either party on 15 days prior written notice. Should the Agreement be terminated, there will be a pro-rata adjustment for advance rental payments. However, if User should default in payment of rent, become insolvent or seek the benefit of any law for the relief of debtors, SCM shall have the right to terminate this Agreement immediately. On any termination, should User fail to deliver possession within five days, SCM shall be entitled to enter upon User's premises during regular business hours and repossess the machines.

APPENDIX H

APPENDIX H

SCM Maintenance Agreement

TERMS AND CONDITIONS
MAINTENANCE AGREEMENT

for

SCM EQUIPMENT

In order to assist its customers in maintaining their equipment in efficient operating condition, SCM Corporation agrees to furnish maintenance service and install parts for the SCM equipment described on the reverse side hereof at the rates there specified and upon the following terms and conditions:

1. This agreement shall be for an initial period of service and inspections ending on the date shown on the reverse side hereof and thereafter continues in effect unless cancelled.
2. Maintenance agreement charges are payable yearly in advance at the annual rate on the annual payment date shown on the reverse side of this agreement.
3. The maintenance agreement may be cancelled after the initial period by either party as of the first day of the month following fifteen days written notice. In the event of cancellation, charges will be prorated and SCM will refund the unearned portion of any amount prepaid hereunder.
4. SCM will provide a minimum of three inspections yearly at appropriate intervals for units located in

Zone 1, and two inspections for all other zones (however, no inspections will be provided for "Vivicopy" photocopy equipment). Inspections may be made in conjunction with emergency service calls. Emergency service calls will be made during regular business hours at no extra charge.

5. SCM will replace without charge parts which have been broken or worn through normal use and are necessary for servicing and maintenance adjustments, *except for* typewriter platens, other rubber typewriter parts, typewriter and photocopy machine motors, photocopy machine lamps and any accessories or supplies such as cords, pads, covers, ribbons, or paper. Also excluded from this agreement are modifications to the equipment.

6. This Agreement shall not apply to repairs made necessary by accident, misuse, abuse, neglect, theft, vandalism, electrical power failure, fire, water, or other casualty, or to repairs made necessary by service performed by personnel other than those of SCM Corporation.

7. The equipment shall be in good mechanical condition on the date of commencement of this agreement.

8. *Photocopy Equipment*: Because SCM photocopy machines are designed to give excellent performance with SCM photocopy supplies, including Microstatic Dispersant, Replenisher and Electrostatic Copy Paper, SCM reserves the right to suspend this agreement as to any machine in which other suppliers' paper or other supplies have been used.

9. *Photocopy Equipment*: This Agreement shall not apply to any repairs made necessary by the use in SCM photocopy machines of dispersant, replenisher, electrostatic copy paper or other photocopy supplies made by other than SCM and not approved by SCM for use in SCM Equipment.

10. This Agreement is not assignable and is automatically cancelled, with respect to the particular machine, should the equipment it covers be sold to a third party.

11. The amount of this agreement shall be increased by an amount equal to any applicable tax now or hereafter assessed, levied or imposed by any federal, state or local authority.

12. *Zones* are defined in relation to the SCM service office providing service for the equipment covered hereunder. The applicable rates for each Zone appear in SCM's price lists.

ZONE I—Within a ten (10) mile radius of the SCM service office or within Metropolitan Area.

ZONE II—Beyond Zone I, but within a thirty-five (35) mile radius of the SCM service office.

ZONE III—Beyond Zone II, but within a seventy-five (75) mile radius of the SCM service office.

ZONE IV—Beyond Zone III, but within a hundred fifty (150) mile radius of the SCM service office.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1028

SCM CORPORATION, *Petitioner*,

—against—

ADVANCE BUSINESS SYSTEMS & SUPPLY COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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January 31, 1970.

The Daily Record Co., Baltimore, Md. 21203

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

This brief in opposition to the petition for writ of certiorari is submitted in behalf of the respondent, Advance Business Systems & Supply Company, the successful plaintiff in this private antitrust action for damages and injunctive relief instituted in December, 1966.

OPINIONS BELOW

The principal and supplementary opinions of the United States District Court for the District of Maryland (Thomsen, C.J.) granting plaintiff a judgment of damages in the

amount of $50,142 and of limited injunctive relief are reported at 287 F. Supp. 143 (App. 1a-41a).

The Final Judgment of the District Court, though caricatured throughout the Petition for Certiorari (see, e.g. pages 4, 5, 6, 13, 14, 19), and though expressly affirmed by the Court of Appeals (App. 52a, 68a), is not reprinted in the Petition for Certiorari or Appendix thereto.[1]

The District Court also rendered extensive Findings of Fact pursuant to Federal Rule of Civil Procedure 52, to which it expressly referred in its opinion (App. 2a), and from which the Petition for Certiorari quotes. (Petition for Certiorari, pages 6 and 14). These Findings of Fact[2] are not printed.

The Opinion of the Court of Appeals (per Sobeloff, J.) affirming the judgment of the District Court and directing the award of additional damages by the District Court is reported at 415 F. 2d 55 (App. 43a). The subsequent *pro forma* order of the Court of Appeals denying SCM's Petition for Rehearing is printed at page 69 of Petitioner's Appendix.[3]

JURISDICTION

Petitioners allege that this Court has jurisdiction by virtue of 28 U.S.C. Section 1254(1).[4] Respondents assert that, by reason of noncompliance with Supreme Court Rules 23(1)(j) and 23(4), the Petition has not been timely perfected.

---

[1] The Final Judgment appears at R. 601 and is printed as an appendix hereto, as is an additional judgment based on the Court of Appeals' decision subsequently entered by the District Court pursuant to a stipulation as to the amount of damages.

[2] R. 357-555.

[3] The instant Petition was filed on the eighty-ninth day following denial of the Petition for Rehearing.

[4] The parties are in agreement that the District Court had jurisdiction under 28 U.S.C. Section 1337.

QUESTIONS PRESENTED

1. Is a Petition for Certiorari which is unaccompanied both by the Final Judgment of the District Court and by the Findings of Fact quoted by Petitioners and entered by the trial court pursuant to Rule 52 of the Federal Rules of Civil Procedure, properly perfected under Rules 23(1)(j) and 23(4) of the Rules of this Court?

2. Is it appropriate, in light of the well-established 'two court' rule, for this Court to review the considered findings of illegal tying purpose made by both the District Court and Court of Appeals with respect to the agreements at issue where the Petitioner has not challenged on appeal the District Court's findings and decree with respect to accompanying illegal tying practices of 'deliberate and dishonest * * * misrepresentation and sabotage' and misuse of rental and service agreements?

STATEMENT

SCM. SCM, the defendant below, is today one of the large manufacturers of copying machines and supplies (R. 502 and App. 44-45a).[5]

SCM began marketing its copying machines in July of 1962; it was one of the earliest machine marketers (App. 4a, 7a). SCM also markets supplies (paper and toner) for its machines. It only sells its supplies for use in its own machines; no attempt is made to sell supplies for use in other machines. The recurring revenues and profits from supplies far exceed the revenues and profits from the sale of machines (R. 372 and App. 5a, 44a). SCM marketing officials recognize that most customer purchases of supplies in a single year will amount to two or three times

[5] The record references (R.) are to the Findings of Fact of the District Court.

the amortized value of the machine. (Transcript at 2400, testimony of Robert Sachs.)

Advance. Advance, the plaintiff, below, is a small Maryland corporation dealing in office equipment and supplies, primarily in the Baltimore metropolitan area. It is a dealer in Nashua Corporation products. Nashua electrostatic copying supplies, which were designed for use in SCM machines, are its principal products. (App. 2a, 43a and R. 357).

Advance is entirely owned by Alan I. Elkin and his wife, Lois Elkin. Mr. Elkin is the president, general manager and dominant figure of the business (R. 357). Mr. Elkin is an experienced sales manager for office equipment. With a staff of only two or three persons (Pl. Ex. 33), he diligently and resourcefully sought to compete in the sale of supplies for use in SCM machines. (App. 24a).

Paper and Supplies for Use in SCM Machines. Since it entered the copying industry in 1962, SCM has marketed paper and supplies only for use in its own machines. Several companies have attempted to compete with SCM in the sale of paper for use in SCM machines. The only significant competitors have been Standard Office Systems (S.O.S.) and Nashua. S.O.S. ceased to be an active competitor in early 1965. Since 1965, Nashua and its dealers have been the only significant competitors of SCM in the sale of copying paper for use in SCM machines (R. 367). In Maryland, Nashua (through Advance) constituted 90% of SCM's competition (App. 45a).

The production of electrostatic paper is intricate and requires a high degree of technology (R. 363). Nashua is one of the largest coaters and producers of specialty papers. By late 1964, Nashua developed and marketed an electrostatic copying paper for use on SCM machines which pro-

duced significantly better contrast than SCM paper (R. 363-64 and App. 6a). Nashua also began using a superior paper cutting device, which SCM later insisted that its supplier use (R. 366). The court found that Nashua paper "has always been at least as suitable as SCM paper for use in SCM machines, and often has been better for many purposes than SCM paper" (App. 6a). SCM extensively tested Nashua paper. SCM's test data showed Nashua to be equal, or superior, to its own paper (R. 365).

For almost a year, from July, 1965 to June, 1966, SCM purchased large quantities of Nashua electrostatic copying paper and marketed it under the SCM label in Canada. No complaints were received from the field concerning the Nashua paper marketed by SCM in Canada (R. 363-64 and App. 6a).

When, in 1962, SCM began marketing electrostatic copying paper, it had no paper technology; it purchased its paper from suppliers. In 1962, SCM entered a contract requiring it to purchase all its paper requirements from Plastic Coatings Corporation (Plastic Coatings) until July, 1965 (R. 363).

The record is replete with evidence of the following facts: that SCM had continuing and sometimes substantial difficulties with the Plastic Coatings paper it marketed from 1962 to late 1965 (R. 363), that Nashua began marketing a better-contrast, better cut, electrostatic paper in December of 1964 (App. 6a, R. 364-67), and that the competitive situation reached crisis proportions in 1965, when SCM's field managers from all corners of the country regularly reported that they were losing supply accounts because Nashua and its dealers offered better-quality paper at lower prices (R. 428-34).

SCM's Restrictive Practices. The trial of this case centered upon Advance's claims that SCM had deliberately

implemented a series of practices to restrict competition in the sale of supplies for use in SCM machines and to coerce customers to use only SCM's (sometimes inferior) paper in the machines. No less than eight such restrictive practices were proved. In most cases the practices were approved by, and the program implemented from, the highest echelon of SCM management.

SCM management first became aware of significant competition for the sale of supplies for use in SCM machines (from S.O.S. and Brüning) in early 1964 (R. 373). The District Court expressly found that immediately afterward, in the first three months of 1964, four restrictive practices were instituted by SCM (App. 7a, R. 373-74).

1. *SCM Policy of Tying Replenisher to Paper.* In 1964, and the first few months of 1965, SCM was the sole source of replenisher (a carbon-like solution, necessary to form an image on the paper) for use in SCM machines (App. 8a, R. 377). In 1963, before competition in the sale of supplies appeared, SCM sold separate cartridges of replenisher at a price of $1.75 per cartridge (App. 8a, R. 375-76). Thereafter, beginning in February of 1964 when competition appeared, it refused to sell replenisher separately from its paper (App. 8a, R. 374-75). Later in 1964, it recanted and offered to sell replenisher separately, but at an exorbitant price of $45.00 per cartridge (App. 8a, R. 375). The court found that the replenisher policies were deliberately implemented to make it impossible for competitive papers to be sold for use in SCM machines (App. 8a, R. 374-75).

2. *Restriction of Sale of Machines.* SCM does not sell, or permit its dealers to sell, its machines to competing paper merchants. Since early 1964, that policy has been vigorously enforced (App. 8a, R. 383). The purpose of this policy is to restrict competitive supply dealers (paper

sales are so significantly more profitable than machine sales that competitors were willing to loan or cheaply rent machines in order to get the paper business) (App. 8a, R. 387) and this policy has restrained Advance from competing effectively for the supply business of customers who desired to rent SCM machines (App. 8a, R. 388).

3. *Restrictions on Sale of Repair Parts.* SCM purchases machine parts from independent suppliers on the condition that the suppliers sell parts only to SCM (App. 57). Beginning in late 1963, SCM restricted sales of repair parts to competitive paper dealers for the purpose of restricting their ability to offer service to their customers (App. 8a-9a, R. 390-96).

4. *SCM's Use of Service Agreement as a Device to Control Supply Sales.* Since it entered the copying industry, SCM had made available to SCM machine users a service agreement (a contract under which service is provided for one year at a flat-rate). Simultaneously with the advent of competition in 1963, SCM added a competitive supplies clause stating that its service agreement "shall not apply to any repairs made necessary by the use of [supplies] made by other than SCM and not approved by SCM" (App. 9a, R. 397). The clause was added at the insistence of the *sales* department; SCM's service department did not know whether competitive supplies would cause service problems (R. 398). A memorandum from the National Sales Manager to the National Service Manager dated October 28, 1963, read as follows:

> "At the present time we are renewing certain maintenance agreements which were issued prior to the insertion of the clause which restricted our service liability to those units using SCM supplies.
>
> While there are not many of them, these old service agreements must not be renewed and in their place

a new agreement must be written containing the proper clause.

There are two reasons for doing this. First, we must establish a principle that is uniform in providing service should competitive supplies be involved and make sure that this principle is maintained. Secondly, we should make the sales department feel that we are cooperating with what weapons we have in terms of a service activity to discourage competitive activity in the paper supply area.

Will you please follow through and see that a bulletin is issued as soon as possible." (R. 398).

The clause is directed against the use of supplies "not approved by SCM for use in SCM machines". SCM has never approved any paper other than its own, for use in SCM machines (R. 400). SCM has never published its paper specifications; they are revealed only to SCM's own paper suppliers (R. 401).

In late 1964, SCM also added a "termination clause", reserving the right to suspend the service agreement "as to any machine in which other supplier's paper or other supplies have been used" (App. 10a, 56a). National officers of SCM instructed personnel to tell customers that SCM cancels the service agreement when a user begins using competitive paper (R. 402-03).

The courts below specifically found that "the competitive supplies clauses, authorized by SCM's national sales department, were designed to be used as a lever to coerce customers to use only SCM supplies. The service agreement was actively and intentionally used for that purpose by field personnel" (App. 9a-11a, 22a-23a, 54a-64a).

When Advance began dealing in Nashua copying paper in December of 1964, it did not intend to service SCM

machines. As soon as Advance sold paper to customers for use in their SCM machines, the customers were threatened with cancellation of their SCM service agreements (R. 405). Mr. Elkin complained to the local SCM branch manager about the threats of cancellation. When, by early March of 1965, SCM continued to threaten the cancellation of service agreements of customers who purchased paper from Advance, Advance was forced to establish a service facility and offer free service to its customers in order to protect its electrostatic business (R. 406, 484, App. 24a).

Later, four additional restrictive practices were introduced:

a. *SCM's Threats of Rental Termination Where Competitive Supplies Were Used.* SCM has rented its smaller machines (Model 33 and 44) to some customers. The District Court and Court of Appeals specifically found that from at least as early as August, 1965 to the date of trial, it was SCM's policy to threaten the cancellation of rental agreements of customers who used competitive supplies. This policy was communicated to SCM machine lessees, including customers of Advance (App. 11a, 21a-22a, 52a-55a).[6]

b. *Tie-In of SCM Supplies to its Model 55 Machine.* From its entry into the industry in 1962, until 1966, SCM had marketed its machines and its paper (supplies) as separate commodities.

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[6] Both the District Court and Court of Appeals found the rental agreement clause "itself not unreasonable" but found an illegal tying condition from the course of conduct supplementing it. (App. 53a). Notwithstanding this, Petitioner makes a point of printing the agreement in its Appendix (App. 77a) in close proximity to the Model 55 copy service agreement. It must be stressed that the Courts below found a rental agreement had never been offered to private users in connection with the Model 55 (App. 11a, 12a, 20a, 48a-49a).

Unlike its marketing of the earlier low-volume models, when SCM introduced its high-volume Model 55 machine early in 1966, it marketed it only under a copy service agreement. The copy service agreement (App. 73a) provides a monthly charge based on the number of meter clicks (copies made) on the machine during the month. The machine rental, supplies, and service are all included under the single meter charge. Since the charge for the machine includes the cost of supplies, the copy service only program was found by both courts below to have the effect of completely excluding competition for the sale of supplies for use in the Model 55 (App. 11a-12a, 48a).

From its introduction in early 1966 until March of 1967, the Model 55 was made available only on a copy service basis. During that period, competing paper sellers were completely foreclosed from sales for use in the Model 55. In 1966 alone, this foreclosed market amounted to 20% of SCM's total paper sales (i.e., 200 million sheets of paper) (R. 413 and App. 51a). The Court of Appeals noted that "the aggregate revenue from this source was $7,000,000." (App. 51a).

SCM began marketing the Model 55 under copy service only. The General Services Administration (GSA), acting upon complaints, issued a series of orders preventing awards of GSA contracts on a basis, such as SCM's copy service only basis, which tied together the machine and supplies. In March of 1967, SCM offered the 55 on alternative plans (for sale, and for rent without supplies) to government users. SCM offered the alternative plans only because a series of GSA decisions compelled it to do so or lose the government's business (R. 411-12, App. 12a).

SCM also began to offer the Model 55 for sale to commercial (non-government) users in March of 1967. It has

never offered the 55 to commercial users on a rental basis (without supplies) (R. 412, App. 48a-49a). As recently as the date of trial, SCM had only sold 110 Model 55's; a negligible number (e.g., when compared with the huge number of machines placed under copy service in only a few months of 1966) (App. 12a and Pl. Ex. 29).

A sizeable number of 55's have been placed in the Baltimore area (See Pl. Ex. 29). None have been sold (App. 12a, R. 413). Advance discovered Model 55's under copy service plans at eight locations in the Baltimore area (many of which had previously purchased supplies from Advance). SCM's copy service plan completely denied plaintiff the opportunity to compete for this business (App. 12a, 50a).

Based on the evidence that, even after it supposedly made an alternative "available", SCM had sold only an insignificant number of machines, and in the government market (where a rental is supposedly "available", but no 55's have been rented) had used a commission structure which induced its salesmen to push the copy service plan rather than the rental, the court found that SCM's recent Model 55 marketing policies have favored the copy service plan and have continued to foreclose competition for the sale of supplies (R. 414-15).

c. *SCM's Deliberate and Dishonest Misrepresentations.* The District Court and Court of Appeals opinions state that SCM employees "deliberately and dishonestly" blamed machine malfunctions on the use of Nashua paper in an effort to induce the customer by means of such misrepresentation to stop using Nashua paper and to buy SCM paper (App. 12a-13a, 53a-54a, 63a).

Numerous disinterested customer-witnesses appeared at trial and testified that they had been told by SCM that

Nashua supplies would damage their machines (R. 420). SCM's Baltimore branch manager in early 1965 knowingly instructed and encouraged his supply salesmen to disparage Nashua supplies and his successor did the same in 1966 (R. 422). SCM's national sales manager instructed the Baltimore branch manager that customers should be told that Nashua and other competitive supplies caused damage to SCM machines (including the incredible statement that Nashua toner "eats" plastic parts in the machine) (R. 421). SCM also undertook an extensive nationally-based direct-mailing campaign in an effort to convince customers that competitive supplies caused machine problems (R. 426).

SCM developed, fostered and encouraged a campaign of disparagements (App. 12a, 53a, 63a) despite the fact that its own tests showed Nashua to be equal or superior to SCM supplies (R. 365) and despite the fact that its own field reports stated that Nashua produced superior copy quality and had no adverse effects on the machines (R. 428-33).

d. *Deliberate Sabotage of Machines Using Competitive Paper.* The courts found that SCM paper salesmen had deliberately sabotaged machines in which Nashua paper was being used, by setting a shutter so that no satisfactory copy could be produced on any paper, and dishonestly placed the blame for the unsatisfactory copy quality on the Nashua supplies (App. 12a, 13a, 53a). The court found that eleven acts of sabotage were performed by SCM representatives with the purpose of coercing or inducing Advance's customers to purchase supplies from SCM (R. 436, 442, 444, 448, 453, 455, 461, 464). The court also found that, as early as March, 1964, a memorandum, passed between SCM national officials, suggested that maladjustment of the machine shutter could be used to impair the

performance of competitive paper and to "control" a competitor's activities (R. 434).

The court refused to treat the misrepresentations or the sabotage as local Baltimore phenomena. Based on the testimony of out-of-state witnesses the court found that at least some of the problems experienced by Advance in Maryland were also experienced in other sections of the country and were the result of SCM's restrictive practices (R. 468-73).

Purpose and Effect of the Restrictive Practices. The practices were found by the District Court and Court of Appeals to have been implemented for the purpose of restricting competition in the sale of supplies for use in SCM machines: replenisher was restricted to make it impossible for competitive supplies to be sold (App. 8a, 23a); deliberate misrepresentations were made to induce the customer to believe that competitive paper caused machine problems and to cease buying competitive supplies (App. 12a, 22a); sabotage was done to cause the customer to believe that competitive paper would not work in SCM machines (App. 13a); the competitive supplies clauses in Service Agreements were designed and used as a lever to coerce customers to use only SCM supplies (App. 9a-11a, 55a-64a); the sale of repair parts was limited to restrict the ability of competing dealers to offer service when the customer was threatened with the termination of his SCM service agreement (App. 8a-9a); the rental policy was to threaten the termination of the rental when competitive supplies were used (App. 11a, 21a-22a, 52a-55a); the purpose of the restriction of the sale of machines was to prevent competitive dealers from offering to rent machines to customers in order to get the supply business (App. 8a) and the copy service plan for the Model 55 completely foreclosed the sale of competitive

supplies over Model 55 machines (App. 11a-12a, 19a-21a, 48a-52a).

ARGUMENT

1. The Petition for Certiorari is a strange document. In it Petitioner declares:

> "SCM does not seek review of the charges against certain SCM Baltimore employees of 'misrepresentations' or 'threats of cancellation' as found by the court below. Such acts were only relevant to the lower court's conclusion that the service maintenance agreement and the rental agreement for the desk top copiers were, in effect, conditioned on purchase of SCM supplies; and although SCM believes that factual conclusion to have been erroneous, it is not challenged here and, for the purposes of analyzing the legality of those agreements and considering the important questions of antitrust law presented, that factual conclusion has been accepted." (Petition for Certiorari, page 7).

These concessions as to misrepresentations and as to threats of cancellation of rental and service agreements are in addition to the concessions made by SCM in the Court of Appeals with respect to the District Court's findings of "deliberate and dishonest" misrepresentations and sabotage:

> "While the findings of selected instances of 'disparagement' and 'tampering' were made over SCM's objection and its offer of evidence to the contrary and are, we submit, against the weight of the evidence, we do not believe this Court would go to the length of reversing them under the 'clearly erroneous standard' which prevails on appeals in non-jury cases." (Appellant's Reply Brief, p. 2).

Thus, SCM appears in this Court in the posture of not disputing the findings with respect to disparagement,

sabotage, threatened cancellation of service agreements and threatened cancellation of rental agreements upon which the District Court and Court of Appeals founded the lion's share of their damage awards to the plaintiff. (App 25a).

In seeking review SCM declares that its quest for review is founded on its desire to contest the Fourth Circuit's "ruling that SCM's service, maintenance, rental, and copy service agreements were illegal". (Petition for Certiorari, pages 7-8). On this basis the Petitioner asks this Court to take jurisdiction to review the "legality" of the three agreements printed seriatim in its appendix (App. 73a-83a). The difficulties with this prayer are several:

a. Neither the District Court nor the Circuit Court said anything at all to indicate that the rental agreement was illegal standing alone. Their award of damages was limited to damages based on the facts relating to *misuse* of the rental agreement and SCM has conceded such facts on this appeal. The injunction of the District Court did not touch the rental agreement.

b. The District Court likewise held on the basis of facts conceded by SCM for purposes of this appeal, that plaintiff was entitled to damages for *misuse* of the service agreement. The Court of Appeals agreed, but further suggested that the service agreement was illegal *in light of its purposes* since the facts of the case established that it was "adopted and imposed on the customer solely for anti-competitive purposes * * * at the insistence of the Sales Department rather than the Service Department". (App. 58a-59a). The Circuit Court did not require the entry of an injunction against the further use of the service agreement and to date no such injunction has been entered.

c. The lower courts did not declare illegal the copy service agreement printed as Appendix F to the Petition nor did such a nonexistent declaration of illegality result in the "demise by judicial fiat" (Petition, page 12) of "single price packages of related products and services" (Petition, page 9). The District Court merely required, in accordance with long-standing antitrust remedial practices, that the defendant, whose deliberate and dishonest misrepresentations and sabotage are conceded for the purposes of the present Petition, henceforth in its dealings in Maryland, the scene of its depredations, desist from further compulsory tying. The decree expressly provided that SCM "*may* market a copy machine on a copy service basis if at the same time defendant offers said machine to the public on a reasonable rental basis without furnishing supplies, and also offers it for sale at a reasonable price." (Final Judgment, R. 602) (emphasis added).

This Court of course has no way of knowing from the Petition that the District and Circuit Courts did not enjoin further use of the rental, service, and copy service agreements carefully printed in Petitioner's Appendix, for Petitioner has omitted to print the final judgment of the District Court.

Rule 23(1)(j) of the Rules of this Court provides in pertinent part:

> "* * * if the review of the judgment or decree of a federal court is sought, there shall * * * be appended a copy of such judgment or decree, which may however be limited to the portions thereof sought to be reviewed."

Rule 23(4) of the Rules of this Court similarly provides:

> "The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of points for considera-

tion may be a sufficient reason for denying his petition."

The omission from the Petition of the Final Judgment of the District Court, and the inclusion in the Petition of three agreements the facial legality of which is in no way at issue clearly transgress the purpose of these rules.

2. The District Court made extensive and indeed voluminous findings of fact and wrote a thorough opinion, as did the Court of Appeals. The two courts were in full agreement as to all of the basic issues of the case save for the single issue whether a service agreement was illegal by reason of the improper purposes for which it was conceived and used (the Court of Appeals' view) or was rather merely illegally put to use (the view of the District Court). The factual findings of the two lower courts, most of which are conceded for purposes of the Petition here, constitute a record of some of the crudest anti-competitive conduct on the part of a major American industrial concern to appear before this or any other appellate court in several decades. Moreover, the record is clear that this conduct originated and was specifically promulgated on the highest levels of the defendant corporation, by the president (R. 379-80), vice president (R. 373, 379-80, 386, and 397) and general sales manager (R. 386, 391, 402 and 421) in various instances. These detailed findings reveal some of what is, in Judge Wyzanski's phrase, the most "dishonestly industrial" conduct imaginable. (*United States v. United Shoe Machinery Corporation*, 110 F. Supp., 341 (D. Mass. 1953), aff'd. 347 U.S. 521 (1954)). Defendant at bottom seeks review not of the judgment, but rather of some strands of reasoning in the Court of Appeals' opinion which it seeks to separate from the record as to the totality of the trade practices employed. Again and again in its

argument, SCM violates the fundamental rule relating to appraisal of the evidence in an anti-trust case that "plaintiffs should be given the full benefit of their proof without entirely compartmentalizing the various factual components and wiping the slate clean after scrutiny of each" (*Continental Ore Company v. Union Carbide & Carbon Corporation*, 370 U.S. 690, 699 (1961)). The limited injunction affecting the copy service program in Maryland and the modest awards of damages are entirely supported by the proof in the record relating to SCM's illegal practices and purposes. It is well settled that "under the established rule, this Court accepts the findings in which two courts concur unless clear error is shown." *Pick Manufacturing Company v. General Motors Corporation*, 299 U.S. 3 (1936). "That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration". *Baumgartner v. United States*, 322 U.S. 665, 670-71 (1944). See Hart and Wechsler, "Note on the 'Two Court' Rule", *The Federal Courts and the Federal System*, (1953) at 1390-92, and see *Goldman v. United States*, 316 U.S. 129, 135 (1942); *United States v. Johnson*, 319 U.S. 503, 518 (1943); *Delaney v. United States*, 263 U.S. 586, 589 (1924).

3. The points sought to be raised by the Petition, even if viewed in isolation from the total conduct of petitioner, the findings of fact of the trial court below, and the judgment of the court below, are insubstantial. Petitioner would have this Court believe that there is something new about the notion that a seller cannot require the purchase of supplies with a machine where a machine is not separately made available for rental and is made available for sale at a cost unattractive to most potential users of the machine. This Court has long made clear that separate availability of products is not enough if the products in

question are made separately available on sufficiently less favorable terms than the combination package. See *United States v. Paramount*, 334 U.S. 131, 159 (1948); *United States v. Loew's, Inc.*, 371 U.S. 38, 54-55 (1962); *Hazeltine, Inc. v. Zenith Radio Company*, 395 U.S. 100 (1969). In any case, "(t)o ensure * * * that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined." *United States v. Loew's, Inc.*, 371 U.S. at 53; *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947). At trial, SCM's own Director of Marketing Research, called as an expert witness by SCM, recognized the developing tendency in corporate financial practices to rent rather than purchase equipment wherever possible (Transcript, 2401).[7] Moreover, the findings of fact of the District Court revealed that the machine in question was not even made available for sale for $4250 until the late spring of 1967, after the institution of plaintiff's lawsuit and after pressure from the General Services Administration; that even after the machines were made available for sale, SCM concealed the availability of the machines on this basis, adopted a commission-rate structure discouraging sale of machines, and advised its salesmen to stress the "advantage of avoiding expenditure for capital investment" (R. 415 and Pl. Ex. S-290a); and that an insignificant number of machines had been sold throughout the nation and as of date of trial none had been sold in Maryland. (R. 408-415).[8] The half million

[7] "(The Court) Is there not a tendency in American business to want to rent everything rather than to buy and amortize?

(The Witness) Yes, it seems to be going in that direction" (Testimony of Robert Sachs, T. 2401).

[8] The trial court expressly found that the Model 55 had *not* been made available on a lease basis (R. 509) and that only 110 such machines had been sold throughout the country by date of trial (R. 514), none in the Baltimore area (R. 514). The number of 55 machines sold represented less than 2% of the number of machines under copy service agreements in 1966 (Pl. Ex. 29).

dollars worth of sales of machines claimed by SCM (Petition, page 11) represents barely a hundred such machines throughout the United States.

Similarly insubstantial are the arguments advanced by SCM with respect to the application of the *Fortner* doctrine to the service, the copy service and the rental agreements.

The Petitioner complains that the Circuit Court concluded that it could assume economic power from the mere "imposition of a tie-in arrangement on a substantial amount of commerce" (Petition for Certiorari, page 15). It is clear that in so holding with respect to copy service and rental agreements the Circuit Court stood on firmly established ground even before this Court's recent decision in *Fortner*. See *Northern Pacific Railway v. U. S.*, 356 U.S. 1 (1958); *Times-Picayune Publishing Company v. U. S.*, 345 U.S. 594, 608-09 (1953). It is further clear that the Petition caricatures the Circuit Court's opinion which expressly recognized that "*Fortner* suggests that even where an appreciable number of buyers are involved the effectiveness of a tie-in may not always show a seller's economic power because it is possible that some tie-ins serve 'legitimate business purposes' 394 U.S. at 506" (App. 62a). The Circuit Court was at pains to demonstrate that no legitimate purpose was served by the tie-in here and that a substantial percentage of SCM machine owners and lessees in the Baltimore area had entered into service maintenance contracts imposing the tying condition (App. 62a-64a). The Circuit Court further stressed that "the District Court's well supported, extensive and clear-cut findings of sabotage, misrepresentations and threats of cancellation underline the fact that the clause in the service contract was an integral part of the pattern of anti-competitive behavior" (App. 63a-64a). In stressing the number of customers affected by the tie-in the Circuit Court properly alluded

to the statement in *United States v. Loew's, Inc.*, 371 U.S. 38 (1962):

> "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."

It is clear that the Circuit Court carefully and correctly applied the law as set forth in *Fortner* and other applicable decisions of this Court.

However, for present purposes it is not necessary to consider the correctness of the Fourth Circuit's view of the law, for the District Court in reaching its conclusions as to illegality relied not only on evidence of customer acceptance of tying conditions but also on the "uniqueness in attributes" of the tying products and services in finding that SCM had sufficient economic power to use its service agreements, rental agreements and machines as tying products. The District Court noted in its opinion "once a customer has purchased or rented an SCM copying machine, he is usually interested in obtaining service from 'factory-trained personnel'; * * * if he is renting the machine, having selected it in preference to other machines, he is usually interested in continuing the rental agreement" (App. 60a). Further, in its findings of fact the Court made numerous findings relating to the unique attributes of the tying products and services. The District Court found that the machines were manufactured under patent license (R. 499) that they were distributed through an unusually wide distributional system (R. 507) that defendant's market share in the direct electrostatic machine market was approximately 37% in 1964 and approximately 13% in 1967 (App. 44a-45a), larger than the 10% market share of gasoline found sufficient in *Osborn v. Sinclair Refining Company*, 286 F. 2d 832, 835, 841 (4th Cir. 1960) cert. denied 366 U.S. 963 (1961); that availability of factory service,

including preventive maintenance, was of great importance to machine owners (R. 397-407); and that the machines of different manufacturers are distinctive and "have various advantages and disadvantages" (App. 5a, R. 477 and Defts. Ex. 39), not being as fungible as sacks of flour, as Petitioner asserts (Petition, p. 15).

At bottom Petitioners have undertaken to seek review of fragments of an opinion rendered by the Fourth Circuit rather than of the judgments rendered by the District Court and the Fourth Circuit. Even if Petitioner's view of the law relating to tie-ins is correct it is clear that Petitioner would not be entitled to reversal in light of the findings of fact of the District Court which amply support the District Court's conclusions relating to the wrongful acts of defendant, its purposes, the sufficiency of the economic power of the defendant and the distinctiveness of its products and services. The propositions advanced by Petitioner are entirely academic in light of the factual record below and Respondent here should not be required in light of the oppression to which it has concededly been subjected by Petitioner to engage in further litigation over fragments of language which cannot alter any portion of the judgments rendered below.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

FINAL JUDGMENT

In the United States District Court
For the District of Maryland

[Same Title]

This cause having come on for trial before this Court, sitting without a jury; and testimony having been taken and all parties having been given an opportunity to be heard on oral argument and written briefs, it is now, therefore, in accordance with the Court's Opinion and Findings of Fact which have been duly filed herein,

ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant is enjoined and restrained against deliberate misrepresentations by its agents and employees attributing the cause of malfunctioning of SCM copying machines to Nashua supplies or other competitive supplies sold or offered for sale by plaintiff in an effort to prevent plaintiff's customers or other users of SCM machines in plaintiff's marketing area from using such competitive supplies.

2. Defendant is enjoined and restrained from distributing its Model 55 copying machine or any other copying machine in Maryland (a) on a copy service basis, that is, a marketing plan under which the customer pays defendant a prescribed charge based on the number of copies made and defendant furnishes the copying machine, supplies and service, or (b) on any other basis which requires that the customer buy or use defendant's supplies; provided, however, that defendant may market a copying

machine on a copy service basis if at the same time defendant offers said machine to the public on a reasonable rental basis without furnishing supplies, and also offers it for sale at a reasonable price. This paragraph shall be effective October 1, 1968. Defendant is ordered and directed to file on or before October 1, 1968, an affidavit of service upon all present holders of copy service agreements in Maryland of the immediate availability of an agreement for the rental of the machine on a reasonable rental basis without furnishing supplies.

3. Whenever defendant offers a copying machine on a copy service basis or other basis requiring the purchase of defendant's supplies, defendant shall also inform the prospective customers in one way or another of the availability of the machine for sale and on a reasonable rental basis without furnishing supplies.

4. The provisions of this judgment shall apply to the defendant SCM Corporation, to each of its officers, directors, agents, employees, subsidiaries, successors and assigns, who shall have received notice of this judgment by personal service or otherwise. Defendant is ordered and directed to serve a copy of this judgment upon (a) each member of its Board of Directors, (b) each of its Vice Presidents and chief managerial officers who are not members of its Board of Directors, and (c) each present employee engaging in direct sales of SCM copying machines or supplies to consumers, or engaged in the servicing of said machines in Maryland. Defendant is directed within 30 days after the effective date of this judgment to file with this Court and serve upon the plaintiff an affidavit as to the fact and manner of its compliance with this section of the decree.

5. Plaintiff is entitled to recover from defendant damages of $16,714, trebled as provided by law, making the total amount of the award $50,142.

6. Plaintiff is entitled to recover from defendant the sum of $35,875 as attorneys' fees, and its taxable costs in the amount of $4,910.61.

7. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the enforcement of compliance therewith, and for the punishment of violations of any of the provisions contained herein.

8. The claims of plaintiff and the claims of defendant are in all other respects dismissed.

ROSZEL C. THOMSEN,

Chief Judge, U.S. District Court

July 11, 1968.

In The United States District Court
For the District of Maryland

(Caption Omitted)

[SUPPLEMENTAL] FINAL JUDGMENT

The Court having considered the matters set forth in the Stipulation of Settlement filed by the parties herein, and having approved the Stipulation of Settlement, it is this 2nd day of January, 1970, ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff is entitled to recover from the defendant, in addition to the damages set forth in the judgment entered herein on July 11, 1968, additional damages in the amount of $6,550, trebled as provided by law, making the total amount of the additional award $19,650.

2. Plaintiff is entitled to recover from the defendant, in addition to the counsel fees set forth in the judgment entered herein on July 11, 1968, additional counsel fees in the amount of $5,000.

3. Interest on this judgment shall be computed from the date of entry hereof.

ROSZEL C. THOMSEN,

Chief Judge.